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The Fraudulent Joinder Prevention Act of 2016: Moving the Law in the Wrong Direction

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THE FRAUDULENT JOINDER PREVENTION ACT OF 2016: MOVING THE LAW IN THE WRONG DIRECTION

E. Farish Percy*

Introduction

As evidenced by continued removal/remand litigation involving allegations of fraudulent joinder,[1] litigants and their lawyers believe that the litigation forum matters a great deal.[2] Plaintiffs generally view state court as a more favorable forum while defendants generally prefer to litigate in federal court due to a perceived advantage.[3] Plaintiffs and defendants alike engage in tactics to select and remain in the more favorable

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1. A Westlaw search of federal court opinions that included the term "fraudulent joinder" yielded 466 district court opinions in 2015, 461 district court opinions in 2014, 509 district court opinions in 2013, fourteen circuit court opinions in 2015, thirteen circuit court opinions in 2014, and twenty-seven circuit court opinions in 2013. *See Fraudulent Joinder Prevention Act of 2015: Hearing on H.R. 3624 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on Judiciary*, 114th Congress 64 (2015) (statement of Professor Arthur D. Hellman) ("Today, removal is a major battleground in civil litigation.") [hereinafter *Hearing on H.R. 3624*].

2. *See* Allyson Singer Breeden, *Federal Removal Jurisdiction and Its Effect on Plaintiff Win-Rates*, Res Gestae, Sept. 2002, at 26 (concluding "plaintiff's ability to avoid removal [from state to federal court] could mean the difference between winning and losing"); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 Am. U. L. Rev. 49, 55 (2009) ("Forum selection is often the most important strategic decision a party makes in a lawsuit."); James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 Alb. L. Rev. 1013, 1013–16 (2006) (concluding forum has "profound impact on the adjudication of claims"). Empirical research has indicated that defendants experience an actual benefit in cases removed based upon diversity in comparison to cases originally filed in federal court based upon diversity. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 598–99 (1998). Even absent empirical evidence demonstrating a real difference between state and federal court, given that the large majority of cases are resolved by settlement rather than trial, even the perception of an advantage based upon forum matters. *See* Rosenthal, *supra*, at 55–56; Underwood, *supra*, at 1013–14.

3. *See* E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 Iowa L. Rev. 189, 191 (2005); Rosenthal, *supra* note 2, at 50; Underwood, *supra* note 2, at 1013–14.

forum.[4] For example, a plaintiff who has a state law tort claim against a citizen from another state may use "strategies to avoid removal" of that claim from state court to federal court based upon diversity jurisdiction by joining a claim against a "non-diverse defendant," thereby defeating complete diversity.[5] If the defendant believes that the plaintiff improperly joined the non-diverse defendant for the purpose of defeating removal, the defendant may engage in forum selection by removing the case to federal court and asserting that complete diversity actually exists because the plaintiff fraudulently joined the non-diverse defendant.[6] Thus, the interpretation and application of the fraudulent joinder doctrine plays a vital role in determining the final forum for numerous cases involving state law claims.[7]

The Fraudulent Joinder Prevention Act of 2016,[8] currently pending before Congress, is intended to reform the existing common law fraudulent joinder doctrine by codifying a "uniform" and "more robust version" of the doctrine that will make it easier for diverse defendants to remove civil cases from state court to federal court based upon allegations of fraudulent joinder.[9] One commentator has remarked not only upon the speed with which the bill was passed by the House of Representatives, but also upon congressional intent to change existing common law and move it in a direction that lowers the threshold for removal.[10]

4. *See* Rosenthal, *supra* note 2, at 50–51. Although "forum shopping" is viewed by some as improper or taboo, forum shopping in a manner that is consistent with applicable statutes and rules governing jurisdiction is "widespread, responsible, and expected as a part of modern litigation." *See id.* at 56–57 (citing J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967)); *see also* Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 105–08 (1999) (concluding lawyers acting within confines of applicable law for purpose of forum shopping are acting ethically); Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QUINNIPIAC. L. REV. 25, 25–26, 60 (2005) (concluding in order to represent clients fully and effectively, lawyers may and should engage in permissible forum selection); Georgene M. Vairo, *Is Selecting Shopping?*, NAT'L L.J., Sept. 18, 2000 (arguing forum shopping is improper only when choice of forum is "frivolous").

5. *See* Rosenthal, *supra* note 2, at 50–51, 60–62.

6. *See id.*

7. *See* Underwood, *supra* note 2, at 1018.

8. Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong. First introduced in the House of Representatives on September 28, 2015, the bill was reported out of the House Judiciary Committee with amendments and passed in amended form by the House of Representatives on February 25, 2016. It has been referred to the Senate Judiciary Committee. For a discussion of the evolution of the bill, see Arthur D. Hellman, *The Fraudulent Joinder Prevention Act of 2016: A New Standard and a New Rationale for an Old Doctrine*, 17 FEDERALIST SOC'Y REV., June 2016, at 34, 36–37. As this Article was going to publication, an identical bill, the Innocent Party Protection Act of 2017, was introduced in the House of Representatives on January 20, 2017. It was passed by the House on March 9, 2017. *See* H.R. 725, 115th Cong. (2017).

9. *See* H.R. REP. NO. 114-422, at 2–5 (2016).

10. *See* Hellman, *supra* note 8, at 39 ("The purpose of the legislation is to change the law.").

The fraudulent joinder doctrine was first established over one hundred years ago by the Supreme Court in an effort to thwart plaintiffs' wrongful attempts to defeat a diverse defendant's right to remove a civil case from state court to federal court by joining a frivolous claim against a non-diverse defendant.[11] The bill's advocates note that the Supreme Court has not addressed or clarified the doctrine since the early 1900s, and they claim that legislation is necessary because lower courts apply the current common law doctrine inconsistently and impose an unfairly heavy burden of proving fraudulent joinder upon removing defendants.[12] The bill's opponents argue that it is an "anti-civil justice measure" that will facilitate "corporate forum shopping" while preventing plaintiffs from vindicating state law claims that properly belong in state court.[13] Although some

11. *See* Percy, *supra* note 3, at 205–15 (discussing Supreme Court's creation of doctrine in early 1900s); *see also infra* notes 31–52 and accompanying text.

12. *See* H.R. 3624, at 2. The representatives in favor of the bill characterize it as one that "makes a modest change to existing law" for the purpose of "mak[ing] the law more fair" by making it easier for out-of-state defendants to remove cases from state court to federal court successfully and by protecting in-state individuals and local businesses from protracted litigation in state court. *See id.* Advocates of the bill also claim that it is consistent with federalism principles. *See id.* at 4. Not surprisingly, groups such as the American Chamber of Commerce and the National Federation of Independent Business favor the bill. *See id.* at 10, 13–14.

13. *See* Susan Steinman, *Damages Caps Bill Stalled in Committee*, TRIAL, June 2016, at 18 (characterizing bill as one of four anti-civil justice measures currently pending in Senate); *see also* Hellman, *supra* note 8, at 34 (noting opponents of bill contend it will obstruct justice for plaintiffs suing corporations for personal injury and expend limited federal judicial resources); Susan Steinman, *Help Fight Corporate Forum Shopping*, TRIAL, Apr. 2016, at 16 (characterizing bill as "'corporate forum shoppin bill" (internal quotation marks omitted)). To the extent the bill does delay and deny justice for plaintiffs with state law claims, the bill may be viewed as part of what some commentators have called the "counter-revolution" in civil procedure and tort law. During this counter-revolution, various barriers or hurdles to justice have been created by federal legislation, such as the Class Action Fairness Act of 2005 and the Federal Arbitration Act, by various tort reform legislation and by Supreme Court interpretation of the procedural rules governing summary judgment, personal jurisdiction, discovery, pleading, and class certification, as well as amendments to the Federal Rules of Civil Procedure, including recent amendments to the discovery rules imposing proportionality limitations that some argue will disparately impact plaintiffs. *See, e.g.*, Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 685–86, 698–700 (2008) (arguing that Class Action Fairness Act of 2005, which increased federal court original and removal jurisdiction over class actions based upon state law, "impede[s] plaintiffs' access to justice" because of significant hurdles to class certification imposed by federal procedural rules and Supreme Court interpretation of those rules and arguing that Supreme Court's broad interpretation of Federal Arbitration Act creates barriers to justice for plaintiffs, which are detrimental to consumers and other less powerful plaintiffs (citing Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1654 (2006))); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 448 (2013) (arguing that Supreme Court's interpretation of commonality requirement for class certification pursuant to Fed. R. Civ. P. 23, its interpretation of summary judgment standard pursuant to Fed. R. Civ. P. 56, and its interpretation of pleading standards pursuant to Fed. R. Civ. P. 8 are all part of fairly recent trend "in the direction of restricting access to justice by mak-

of the bill's minor provisions reasonably resolve existing inconsistencies in the manner in which lower courts currently apply the common law fraudulent joinder doctrine, the bill, in its entirety, will not achieve the uniformity, effectiveness or fairness purportedly desired by its advocates.[14] Instead, the bill, if enacted, will significantly alter existing law[15] in a manner that will: (i) "delay [or] possibly deny justice for [many] plaintiffs with meritorious state law claims," (ii) increase fraudulent joinder litigation and concomitant costs to the parties and the federal courts, (iii) introduce even greater uncertainty and complexity into an already complicated area of the law, and (iv) raise serious federalism concerns by intruding upon the states' ability to establish and decide state substantive and procedural law.[16]

Most notably, the bill establishes a more lenient standard for fraudulent joinder by providing that a defendant has been fraudulently joined if the district court finds that "it is not plausible to conclude that applicable State law would impose liability on [that] defendant."[17] An interrelated procedural provision authorizes district courts to consider extrinsic evidence when making this plausibility determination and places no limitation upon such consideration. The plausibility pleading standard established in *Bell Atlantic Corp. v. Twombly*[18] and *Ashcroft v. Iqbal*[19] forms the basis for the bill's plausibility standard.[20] The plausibility pleading

ing it more difficult for plaintiffs to bring claims and have them" decided upon merits); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1848 (2014) ("Plausibility pleading . . . is nothing less than a 'revolutionary' departure from notice pleading and from the original vision of the Federal Rules.").

14. As discussed *infra* at notes 84–94 and 189–98 and accompanying text, the bill does reasonably resolve lower court splits with respect to: (i) whether the doctrine applies solely to the joinder of non-diverse defendants or also to the joinder of diverse in-state defendants or (ii) whether district courts may consider affirmative defenses when determining fraudulent joinder.

15. *See Hearing on H.R. 3624*, *supra* note 1, at 29 (statement of Professor Lonny Hoffman) (noting bill would "dramatically alter existing [jurisdictional] law").

16. *See* H.R. REP. NO. 114-422, at 18–19 (2016). Representatives opposing the bill have made similar predictions. *See id.* President Obama's administration strongly opposed the bill, arguing that it "[will make] it more difficult for individuals to vindicate their rights in State courts" and characterizing it as "a solution in search of a problem." *See* 162 CONG. REC. H912 (daily ed. Feb. 25, 2016) (statement of Administration Policy, Executive Office of the President, Office of Management and Budget). In addition, groups such as Alliance for Justice, American Association of Justice, Consumer Federation of America, Consumer Watchdog, National Association of Consumer Advocates, and Public Citizen oppose the bill. *See id.* (statement of Rep. Conyers).

17. *See* H.R. REP NO. 114-422, at 2–4 (calling current standard "very demanding" and predicting that bill would provide "better opportunity" to defendants to secure federal forums by removing based upon fraudulent joinder); *see also* Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong. § 2.

18. 550 U.S. 544 (2007).

19. 556 U.S. 662 (2009).

20. *See* H.R. REP. NO. 114-422, at 12 (stating term "plausible" was taken from Supreme Court's opinions in *Twombly* and *Iqbal* and suggesting that Court's deci-

standard has generated an enormous amount of litigation and controversy, and it has failed to establish a uniform pleading standard.[21] Based upon the fallout from *Twombly* and *Iqbal*, it is reasonable to predict that the bill's plausibility standard for fraudulent joinder will raise even greater difficulty given that district courts will have to make the plausibility finding based on the pleadings and extrinsic evidence presumably related to the merits of the state law claim against the non-diverse spoiler. The manner in which the plausibility pleading standard should be transposed to the fraudulent joinder evidentiary standard is not self-evident. Even if the bill is not passed during this legislative session, its advocates are likely to continue to introduce and seek support for similar legislation in the future.[22]

Given the frequency with which fraudulent joinder is litigated, it is imperative that any legislation altering the doctrine be carefully considered.[23] Congress should determine whether the bill appropriately balances (i) federalism concerns that are raised every time Congress broadens original diversity jurisdiction or removal jurisdiction based upon diversity, (ii) diverse defendants' interests in having state law claims decided in federal court, (iii) whether there is any helpful existing precedent that will guide courts in the application of new fraudulent joinder standards, (iv) the likely success of any new fraudulent joinder standards in achieving uniformity, (v) the additional costs that will be generated by the increased fraudulent joinder litigation that the bill is certain to produce, and (vi) whether the new fraudulent joinder standards will give rise to greater abuse by removing defendants.

Part I of this Article reviews the current framework for removal based upon diversity jurisdiction and the development and application of the common law fraudulent joinder doctrine. Part I also includes a discussion of the degree to which lower courts apply the doctrine inconsistently. Part

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sions in those cases will provide "substantial guidance" regarding meaning of term).

21. *See* A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1712 (2013) (observing *Twombly* and *Iqbal* caused uproar and that resulting rule is "pernicious for its overinclusiveness, subjectivity, and disruptiveness" (footnotes omitted)); Joseph A. Steiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1038–41 (discussing circuit courts' differing interpretations of *Twombly*); Michael Eaton, Comment, *The Key to the Courthouse Door: The Effect of* Ashcroft v. Iqbal *and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 319–25 (2011) (discussing inconsistent application of plausibility pleading standard); Colleen McNamara, Note, Iqbal *as Judicial Rorschach Test: An Empirical Study of District Court Interpretations of* Ashcroft v. Iqbal, 105 NW. U. L. REV. 401, 403–04 (2011) (concluding "*Twombly* and *Iqbal* opinions have actually created more inconsistency in the federal pleading standards across (and even within) the circuits").

22. As discussed *supra* in note 8, The Innocent Party Protection Act of 2017 is identical legislation recently introduced in the 115th Congress and passed by the House of Representatives on March 9, 2017.

23. *See supra* note 1 (noting that district courts decide more than 450 fraudulent joinder cases each year).

II parses the provisions of the Fraudulent Joinder Prevention Act of 2016. Part III of this Article addresses whether the fraudulent joinder doctrine should apply to diverse in-state defendants and to non-diverse defendants and concludes that it should.

Part IV then turns to the bill's most significant provision that would transform existing law by establishing a lower threshold for fraudulent joinder based upon a finding that it is not plausible to conclude that state law would impose liability upon the non-diverse defendant. In doing so, Part IV compares and contrasts this standard with the plausibility standard established in the pleading context in *Twombly* and *Iqbal*. This Article predicts that the plausibility standard contemplated by the bill will not be consistently or uniformly applied and that the vague and ambiguous nature of the standard will encourage defendants to remove cases in which there has been no fraudulent joinder. Moreover, this Article argues that the bill's plausibility standard raises serious federalism concerns.

Part V of this Article considers the bill's most significant procedural provision authorizing district courts to consider extrinsic evidence when determining fraudulent joinder. This Article argues that a district court's consideration of extrinsic evidence should be limited to ensure that the district court is determining jurisdiction rather than determining the merits of the claim against the jurisdictional spoiler.

The remainder of this Article addresses the bill's other three grounds for fraudulent joinder. Part VI of this Article analyzes the bill's provision basing fraudulent joinder upon a finding that the claims against the defendant are clearly barred by state or federal law, including affirmative defenses and common defenses. This Article argues that district courts should be permitted to consider certain affirmative defenses when determining fraudulent joinder but not common defenses.

Part VII critiques the bill's provision basing fraudulent joinder upon a finding that objective evidence clearly demonstrates that there is no good faith intention to prosecute the action against the jurisdictional spoiler. This Article concludes that this standard for determining fraudulent joinder will be inefficient given that little objective evidence is likely to exist at the time a motion to remand is ruled upon and the relative ease with which plaintiffs may create evidence of a good faith intent to prosecute.

Part VIII examines the bill's provision basing fraudulent joinder upon a finding of actual fraud in the plaintiff's pleading of jurisdictional facts. It explores the meaning of "actual fraud" and "jurisdictional facts," terms that are not defined in the proposed legislation, and also considers the applicable evidentiary burden. This Article asserts that this provision raises many unanswered questions and is also unnecessary.

This Article concludes that, although some judicial or legislative reform is desirable for the purpose of establishing greater uniformity and clarity with respect to the application of the fraudulent joinder doctrine, the bill would establish a problematic, multi-pronged standard for fraudu-

lent joinder that will create even greater uncertainty and lack of uniformity, unfairly deny or delay justice for some plaintiffs, and also raise grave federalism concerns.

I. THE COMMON LAW FRAUDULENT JOINDER DOCTRINE

A. *Existing Statutory Procedure for Removal and Remand*

In order to evaluate the manner in which the fraudulent joinder doctrine should be reformed, this Section first reviews the existing statutory framework for removal based upon diversity jurisdiction and the Supreme Court's precedent establishing the fraudulent joinder doctrine in the early 1900s. It then analyzes the manner in which the doctrine is currently applied by lower courts and considers whether reform is desirable.

Under existing law, a civil case may be removed from state court to federal court based upon diversity jurisdiction only if the case could have been originally filed in federal court based upon diversity jurisdiction.[24] A federal district court may exercise original diversity jurisdiction over a civil case if there is complete diversity between the plaintiff(s) and defendant(s) and the amount in controversy exceeds $75,000, exclusive of interest and costs.[25] In addition, a case may not be removed based upon diversity jurisdiction if any properly-joined and served defendant is a citizen of the forum state.[26] Thus, a plaintiff may attempt to defeat a diverse defendant's right to remove by joining claims against a non-diverse defendant, thereby destroying complete diversity, or by joining a diverse in-state defendant, thereby rendering removal improper pursuant to the forum defendant rule. In this sense, non-diverse defendants and in-state defendants are jurisdictional spoilers for removal.

As grounds for removal in a case in which the plaintiff sued a diverse defendant and a non-diverse defendant, the diverse defendant may remove based upon complete diversity by asserting that the plaintiff fraudulently joined the non-diverse defendant.[27] In response, the plaintiff may

24. *See* 28 U.S.C. § 1441(a) (2012).

25. *See* 28 U.S.C. § 1332(a) (2012). Minimal diversity exists when at least one plaintiff and one defendant are citizens of different states; complete diversity exists when no plaintiff and defendant are citizens of the same state. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3.3 & n.34 (4th ed. 2003). The Constitution authorizes federal courts to exercise jurisdiction based upon minimal diversity. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967) (interpreting Article III, Section 2 of Constitution as authorizing jurisdiction based upon minimal diversity). Although Congress has extended federal court jurisdiction to a relatively narrow range of cases involving minimal diversity jurisdiction by enacting the Class Action Fairness Act of 2005 and the Multiparty, Multiforum Trial Jurisdiction Act of 2002, the jurisdiction granted by Section 1332(a) requires complete diversity. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806).

26. *See* 28 U.S.C. § 1441(b)(2). This provision is sometimes referred to as the forum defendant rule. *See, e.g.*, Morris v. Nuzzo, 718 F.3d 660, 663–64 (7th Cir. 2013).

27. In order to remove a case to federal court, the defendant must file a notice of removal in the federal district court containing a short and plain statement

move to remand, arguing that complete diversity is lacking because the non-diverse defendant was not fraudulently joined.[28] In ruling on the motion to remand, the district court must determine whether the plaintiff fraudulently joined the non-diverse defendant. If so, the court will dismiss the claims against the non-diverse defendant and retain jurisdiction over the remaining claims against the diverse defendant.[29] If not, the district court will remand the case back to state court.[30]

B. *Supreme Court Precedent Establishing the Doctrine*

The Supreme Court first affirmed removal based upon fraudulent joinder in *Wecker v. National Enameling & Stamping Co.*[31] There, Wecker sued his diverse employer for negligence in state court, alleging that his employer negligently failed to guard and cover pots filled with boiling grease and lubricants.[32] Wecker's job required him to lift barrels of grease to the top of a furnace structure and dump the contents into pots.[33] Wecker alleged that "he lost his balance" on top of the furnace and "fell

of the grounds for removal. *See* 28 U.S.C. § 1446(a) (2012). All properly-joined and served defendants must join in or consent to the removal. *See id.* § 1446(b)(2)(A). If the plaintiff's initial pleading is removable, the defendant shall file the notice of removal within thirty days after the earliest of (i) the defendant's receipt of the initial pleading or (ii) service of summons on the defendant if the initial pleading has been filed and is not required to be served upon the defendant. *See id.* § 1446(b). If the plaintiff's initial pleading is not removable but later becomes removable, the defendant may file the notice of removal "within thirty days after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *See id.* § 1446(b)(3). "A case may not be removed . . . on the basis of [diversity jurisdiction] more than [one] year after commencement of the action [in state court], unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." *Id.* § 1446(c)(1). In addition, in a case originally lacking complete diversity, the plaintiff's voluntary dismissal of the non-diverse defendant renders the case removable but the court's "involuntary" dismissal of the non-diverse defendant does not. *See* Percy, *supra* note 3, at 207–11 (discussing voluntary/involuntary rule and its traditional justifications).

28. After a case has been removed to federal court, the plaintiff may file a motion to remand to state court, arguing that the case was improperly removed. *See* 28 U.S.C. § 1447(c) (2012). Motions to remand based upon lack of subject matter jurisdiction may be filed at any time; motions to remand based upon other defects must be made within thirty days after the filing of the notice of removal. *See id.*

29. *See, e.g.*, Walters v. Metro. Lloyds Ins. Co. of Tex., No. 4:16-CV-307, 2016 WL 3764855, at *3–4 (E.D. Tex. July 14, 2016) (dismissing jurisdictional spoiler after finding fraudulent joinder and retaining jurisdiction over remaining clams against diverse defendant).

30. *See, e.g.*, Brooks v. Merck & Co., 443 F. Supp. 2d 994, 1006–07 (S.D. Ill. 2006) (remanding case to state court after finding that removing defendant failed to prove fraudulent joinder).

31. 204 U.S. 176 (1907).

32. *See id.* at 178.

33. *See id.*

into one of the open, unguarded, and unprotected pots" filled with boiling grease.[34] Wecker joined claims against Schenck and Wettengel, two allegedly non-diverse co-employees, asserting that they were responsible for the design and maintenance of the furnace structure and for supervising Wecker.[35] Wecker's diverse employer removed, asserting that Schenck was diverse from Wecker and that Wettengel was not responsible for designing or maintaining the furnace structure or for supervising Wecker.[36] The employer submitted an affidavit in which the employer's head engineer stated that Wettengel was merely a draftsman who made drawings for the mechanics after Wettengel had been given the plans.[37] The engineer further stated that Wettengel had no authority to select or approve the plans or to employ, discharge or supervise other workers, including Wecker.[38] In response, Wecker submitted an affidavit in which he stated that he had heard the engineer direct Wettengel to prepare plans for the furnace.[39] In ruling on the motion to remand, the district court considered the affidavits and concluded that Wecker had fraudulently joined Wettengel.[40]

The Supreme Court affirmed, finding that Wettengel was fraudulently joined for the purpose of defeating the diverse employer's right to remove.[41] The Court held that "[f]ederal courts should not sanction devices intended to prevent a removal to a [f]ederal court where one has that right, and should be equally vigilant to protect the right to proceed in the [f]ederal court as to permit the state courts, in proper cases, to retain their own jurisdiction."[42] In finding fraudulent joinder, the Court essentially found no reasonable basis for Wecker's allegation that Wettengel was employed in a position that gave rise to any duty to select, review, or alter the design plans for the furnace or to supervise Wecker.[43]

In *Chesapeake & Ohio Railway Co. v. Cockrell*,[44] the plaintiff sued a diverse railway company, a non-diverse engineer, and a non-diverse fireman for negligently causing the death of plaintiff's intestate.[45] The Supreme Court held that plaintiff's joinder of the non-diverse engineer and fireman

34. *See id.*

35. *See id.* at 179.

36. *See id.* at 179–80.

37. *See id.* at 183–84.

38. *See id.*

39. *See id.* at 184.

40. *See id.* at 180–81.

41. *See id.* at 185. The Court determined that Wecker's affidavit did not rebut, and was consistent with, the other "undisputed testimony as to the nature and character of Wettengel's employment in the subordinate capacity of a draftsman." *See id.*

42. *See id.* at 186.

43. *See id.* at 185 (stating "apparent want of basis for the allegations" led to conclusion that Wettengel "was joined for the purpose of defeating [removal]").

44. 232 U.S. 146 (1914).

45. *See id.* at 149.

was not fraudulent because the removing employer failed to prove that the joinder "was without any reasonable basis."[46]

In *Wilson v. Republic Iron & Steel Co.*,[47] the Supreme Court affirmed the district court's denial of plaintiff's motion to remand.[48] Wilson sued his diverse employer and a non-diverse co-employee alleging that they were jointly liable for injuries he sustained in the course of employment.[49] The diverse employer removed, asserting that the non-diverse co-employee was not present when the plaintiff was injured and was in no way responsible for the plaintiff's injuries.[50] Defendant's petition of removal was sworn and plaintiff failed to contest the sworn petition.[51] The Court affirmed the lower court's finding of fraudulent joinder, holding that a diverse defendant's right to remove "cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy."[52]

C. *Current Application of the Fraudulent Joinder Doctrine*

The modern day fraudulent joinder doctrine is not only complex, but is also applied in a somewhat inconsistent and varied manner throughout the country.[53] Rather than inquiring into the plaintiff's subjective motive for joining the spoiler, courts generally use an objective test focused on the basis for the plaintiff's claim against the spoiler.[54] Most courts employ

46. *See id.* at 153.

47. 257 U.S. 92 (1921).

48. *See id.* at 99.

49. The claim against the employer was based upon a state statute, and the claim against the co-employee was based upon common law negligence. *See id.* at 93.

50. *See id.* at 97.

51. *See id.* at 94–95. As explained by the Court, under then existing procedure, if the plaintiff had contested the defendant's sworn petition for removal, the removing defendant would then have had the burden of proving fraudulent joinder. *See id.* at 97. Under current procedure, the notice of removal is neither sworn nor verified.

52. *See id.* at 97 (citing Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 185, 186 (1907)).

53. *See* Percy, *supra* note 3, at 216–39 (discussing different fraudulent joinder tests used by lower courts, varying degree to which lower courts authorize consideration of extrinsic evidence, and inconsistency in lower courts' consideration of affirmative defenses, including common defenses).

54. *See* FEDERAL JUDICIAL CODE REVISION PROJECT 515 (AM. LAW INST. 2004) ("[I]n most instances, 'fraudulent' is a term of art that is applied without regard to the plaintiff's state of mind." (citing Lowell Staats Mining Co. v. Phila. Elec. Co., 651 F. Supp. 1364, 1366 n.1 (D. Colo. 1987))); Hellman, *supra* note 8, at 35; Percy, *supra* note 3, at 217. Although many circuit courts have acknowledged that fraudulent joinder may be based upon actual fraud in the pleadings, very few cases actually involve fraud in the pleadings. *See infra* notes 237–39 and accompanying text. In addition, a few courts have considered whether the plaintiff subjectively intends in good faith to obtain a judgment against the spoiler. Both of these subjective standards—the "actual fraud in the pleading" standard and the "lack of good faith intent to prosecute" standard are likely to be costly, problematic, and inefficient.

some variant of the following four predominant tests to determine fraudulent joinder: (i) the "reasonable basis for the claim" test that focuses on whether there is a reasonable basis in law and fact for the claim against the spoiler,[55] (ii) the "no possibility" of recovery test that asks whether there is any possibility the plaintiff will recover from the spoiler,[56] (iii) the "reasonable possibility" of recovery test that asks whether there is any reasonable possibility the plaintiff will recover from the spoiler,[57] and (iv) the failure to state a claim test that focuses on whether the complaint states a claim against the spoiler pursuant to state law.[58] While these tests are ar-

See infra notes 213–64 and accompanying text. Thus, this Article contends that an objective standard focused on the basis for the plaintiff's claim against the spoiler should be used to determine fraudulent joinder.

55. *See, e.g.*, Wivell v. Wells Fargo Bank, N.A., 773 F.3d 887, 893 (8th Cir. 2014) (joinder is fraudulent "if there is no reasonable basis for the imposition of liability under state law"); Spizizen v. Nat'l City Corp., 516 F. App'x 426, 429 (6th Cir. 2013) ("To prove fraudulent joinder, the removing defendant must show that the plaintiff did not have a colorable cause of action against the defendant in state court." (citing Coyne v. Am. Tobacco Co., 183 F.3d 488, 492–93 (6th Cir. 1999))); Roggio v. McElroy, Deutsch, Mulvaney & Carpenter, 415 F. App'x 432, 433 (3d Cir. 2011) (citing *In re* Briscoe, 488 F.3d 201, 216 (3d Cir. 2006)); Smoot v. Chi., Rock Island & Pac. R.R. Co., 378 F.2d 879, 881 (10th Cir. 1967) (stating issue is "whether the allegations . . . were without factual basis and a complete sham").

56. *See, e.g.*, Johnson v. Am. Towers, LLC, 781 F.3d 693, 704 (4th Cir. 2015) (stating joinder is fraudulent if "'there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court'" (quoting Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999))); Ullah v. BAC Homes Loans Servicing LP, 538 F. App'x 844, 845–46 (11th Cir. 2013) (stating joinder is fraudulent if "there is no possibility the plaintiff can establish a cause of action against the resident defendant" (quoting Stillwell v. Allstate Ins. Co., 663 F.3d 1329, 1332 (11th Cir. 2011)) (internal quotation marks omitted)); Briarpatch Ltd., L.P. v. Phx. Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004) (stating joinder is fraudulent if "there is no possibility that the claims against that defendant could be asserted in state court" (citing Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998))).

57. *See, e.g.*, Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 764 (7th Cir. 2009) (stating joinder is not fraudulent if there "is 'any reasonable possibility' that the plaintiff could prevail against the non-diverse defendant" (quoting Poulos v. Naas Foods, Inc., 959 F.2d 69, 71 (7th Cir. 1992))); Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004) ("[T]he test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.").

58. *See, e.g.*, Weeping Hollow Ave. Tr. v. Spencer, No. 13-16060, 2016 WL 4088749, at *3 (9th Cir. Aug. 2, 2016) (quoting McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987)) (stating joinder is fraudulent "[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state" (quoting Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001)) (alteration in original)); Universal Truck & Equip. Co. v. Southworth-Milton, Inc., 765 F.3d 103, 108 (1st Cir. 2014) (stating joinder is fraudulent if "there is no reasonable possibility that the state's highest court would find that the complaint states a cause of action upon which relief may be granted against the non-diverse defendant" (citing *Poulos*, 959 F.2d at 73; *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987))).

guably substantially similar in that they all focus in some manner on the plaintiff's basis for the claim against the spoiler, they will render different outcomes in at least a narrow range of cases.

In addition, "[circuit] courts differ in the degree to which [district courts should] pierce the pleadings and consider extrinsic evidence" when determining fraudulent joinder.[59] While many courts have sanctioned some form of limited piercing of the pleadings, other courts engage in much broader piercing of the pleadings in a procedure that resembles a summary judgment-type procedure.[60] Although the large majority of courts will consider certain affirmative defenses when determining fraudulent joinder, there is less agreement over consideration of common defenses—defenses that equally dispose of the plaintiff's claim against the spoiler and the diverse defendant.[61]

Thus, in some cases, a diverse defendant's ability to remove varies from jurisdiction to jurisdiction.[62] Given the inconsistency and lack of clarity regarding the doctrine's application, there is certainly room for reform and improvement, but Congress should carefully consider any proposed reform to ensure that it moves the fraudulent joinder doctrine in the correct direction.[63]

II. THE FRAUDULENT JOINDER PREVENTION ACT'S PROVISIONS

This Section briefly summarizes each provision of the bill in the order of its appearance to facilitate an understanding of the provisions and the manner in which they interrelate. The bill would amend 28 U.S.C. § 1447, governing procedure after removal, including motions to remand, by adding subparagraph (f). Proposed subsection (f)(1) indicates that subparagraph (f) applies only to cases: (i) removed to federal court based upon diversity jurisdiction, (ii) in which the plaintiff then files a motion to remand alleging that removal was improper because there is incomplete diversity or an in-state defendant, and (iii) in which the defendant opposes the motion to remand by claiming that the plaintiff fraudulently joined the non-diverse or in-state defendant. This provision resolves a split

59. E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J. L. & PUB. POL'Y 569, 581 (2006).

60. *See* Percy, *supra* note 3, at 224–26.

61. *See id.* at 229–39; *see also infra* notes 178–86 and accompanying text. Courts have inconsistently decided other issues regarding the fraudulent joinder doctrine that are not addressed by the bill. For example, the bill does not attempt to resolve issues regarding the application of the emerging fraudulent misjoinder doctrine, holding that fraudulent joinder occurs when a plaintiff with meritorious claims against the diverse and non-diverse defendants has improperly joined the claims together in one lawsuit in violation of governing procedural joinder rules. *See* Percy, *supra* note 59 (discussing emerging doctrine and issues regarding its application).

62. *See* Percy, *supra* note 3, at 195.

63. *See id.* (discussing manner in which common law fraudulent joinder doctrine should be improved and clarified).

among district courts by clarifying that the fraudulent joinder doctrine applies to the joinder of diverse in-state defendants, as well as to the joinder of non-diverse defendants.[64]

Subsection (f)(2) then lists four alternative grounds upon which a district court may find fraudulent joinder.[65] Subsection (f)(2)(A) provides that joinder of a defendant is fraudulent if the district court finds "there is actual fraud in the pleading of jurisdictional facts with respect to that defendant."[66] House Report 422 indicates that this subsection merely codifies existing common law and suggests that "actual fraud" involves "'false allegations,' such as misrepresenting or concealing the citizenship of a party."[67]

Subsection (f)(2)(B) provides that joinder of a defendant is fraudulent if the district court finds, after considering the pleadings, amended pleadings, affidavits, and other extrinsic evidence, that "it is not plausible to conclude that applicable State law would impose liability on that defendant."[68] This provision establishes a more lenient standard for establishing fraudulent joinder because it repudiates the "any reasonable possibility that state law will impose liability on the defendant" standard and replaces it with a plausibility standard. Although not evident from the bill's language, House Report 422 indicates that the bill's plausibility standard is essentially a "reasonable likelihood" standard requiring the court to determine, after reviewing the pleadings and the evidence, "whether there is a reasonable likelihood that the plaintiff can muster factual support for each element of the state-law claim."[69] This provision, more than any other, would significantly alter the current common law fraudulent joinder doctrine.

Subsection (f)(2)(C) provides that joinder of a defendant is fraudulent if the district court finds that "[s]tate or [f]ederal law clearly bars all claims in the complaint against that defendant."[70] This provision is intended to resolve a split among lower courts over whether affirmative de-

64. A Virginia citizen who sues a New York citizen in Ohio state court may defeat removal jurisdiction by joining a defendant who is a citizen of Virginia, a non-diverse defendant, or by joining a defendant who is a citizen of Ohio, a diverse in-state defendant. Most district courts apply the fraudulent joinder doctrine to the joinder of diverse in-state defendants in addition to the joinder of non-diverse defendants. A few district courts, primarily those in the Southern District of Illinois, limit the doctrine's application to the joinder of non-diverse defendants. *See* H.R. REP. NO. 114-422, at 10 & n.13 (2016).

65. *See* Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong. § 2.

66. *See id.*

67. *See* H.R. REP. NO. 114-422, at 12.

68. *See* H.R. 3624 § 2.

69. *See* H.R. REP. NO. 114-422, at 13 (noting that "reasonable likelihood" standard is "quite different" from "reasonable possibility" standard currently used by many courts).

70. *See* H.R. 3624 § 2.

fenses can be considered as bases for finding fraudulent joinder.[71] The provision's reference to state and federal law makes it clear that defenses based upon state and federal law, such as defenses based upon the statute of limitations, federal preemption, and immunity, may be considered when determining fraudulent joinder.[72] When read together, subsections (f)(2)(B) & (C) would abrogate the Fifth Circuit's decision in *Smallwood v. Illinois Central Railroad Co.*,[73] holding that common defenses cannot constitute bases for finding fraudulent joinder.[74]

Subsection (f)(2)(D) provides that joinder of a defendant is fraudulent if the district court finds that "objective evidence clearly demonstrates that there is no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant."[75] House Report 422 indicates that the district court may consider only objective evidence of the plaintiff's intent—a district court "should not inquire into the subjective intent of the plaintiff or his or her lawyer."[76]

Subsection (f)(3) provides that the district court "may permit the pleadings to be amended, and shall consider the pleadings, affidavits, and other evidence submitted by the parties" when determining fraudulent joinder.[77] House Report 422 characterizes this provision as a codification of existing law.[78] Most circuit courts, however, have held that consideration of extrinsic evidence should be limited so as to ensure that a determination of jurisdiction does not become a determination on the merits.[79] The bill does not place any limitation on the court's consideration of extrinsic evidence or the scope of discovery that may be pursued while the motion to remand is pending in federal court. House Report 422 suggests

71. *See* H.R. REP. NO. 114-422, at 14.

72. *See id.*

73. 385 F.3d 568 (5th Cir. 2004).

74. *See* H.R. REP. NO. 114-422, at 14.

75. *See* H.R. 3624, § 2.

76. *See* H.R. REP. NO. 114-422, at 15. As discussed *infra* in notes 234–13 and accompanying text, many courts will not consider evidence of the plaintiff's subjective intent.

77. *See* H.R. 3624 § 2.

78. *See* H.R. REP. NO. 114-422, at 15 (stating bill is consistent with "widely followed judicial practice of considering affidavits and other materials outside the pleadings when determining whether joinder is fraudulent" (citing Herkenhoff v. Supervalu Stores, Inc., No. 4:13CV1974 SNLJ, 2014 WL 3894642, at *3 (E.D. Mo. Aug. 18, 2014))).

79. *See* Percy, *supra* note 3, at 224–29; *see also, e.g.*, Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573–74 (5th Cir. 2004) (cautioning consideration of extrinsic evidence "is appropriate only to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant"); Smoot v. Chi., Rock Island & Pac. R.R. Co., 378 F.2d 879, 882 (10th Cir. 1967) ("[A] federal court [should not] pre-try, as a matter of course, doubtful issues of fact to determine removability; the issue must be capable of summary determination and be proven with complete certainty." (citing McLeod v. Cities Serv. Gas Co., 233 F.2d 242 (10th Cir. 1956))).

that any discovery authorized by the federal rules is appropriate.[80] House Report 422 acknowledges that the plausibility standard is more demanding than the pleading standard established by many state court procedural rules, thereby making it necessary to give the plaintiff an opportunity to amend the complaint after removal if such amendment is necessary to satisfy the more demanding plausibility standard.[81]

Finally, subsection (f)(4) provides that if the court finds that a defendant has been fraudulently joined, "it shall dismiss without prejudice the claims against [that defendant] and shall deny the motion [to remand]."[82] Most appellate courts that have addressed the issue have held that dismissal should be without prejudice.[83]

III. APPLICATION OF THE DOCTRINE TO DIVERSE IN-STATE DEFENDANTS

Although the fraudulent joinder doctrine has long been applied to joinder of non-diverse defendants, no appellate court has squarely addressed whether the doctrine also applies to joinder of diverse in-state defendants, and district courts are split on this issue.[84] The bill would resolve this split by clarifying that the doctrine applies equally to joinder of non-diverse defendants and diverse in-state defendants.

The Seventh Circuit considered whether to extend the fraudulent joinder doctrine to joinder of diverse in-state defendants in *Morris v. Nuzzo*,[85] but it expressed concern about reaching the first appellate resolution of an issue not frequently decided by district courts in the absence of helpful briefing and did not definitively rule on the issue.[86] The Seventh

80. *See* H.R. Rep. No. 114-422, at 16.

81. *See id.* at 15–16.

82. *See* H.R. 3624 § 2.

83. *See id.* at 16.

84. *See* Morris v. Nuzzo, 718 F.3d 660, 666 (7th Cir. 2013) (stating it does not appear that any appellate court has addressed issue and noting district courts are split); White v. M/Y Senses, LLC, No. 15-cv-01652-JD, 2015 WL 5210328, at *1 (N.D. Cal. Sept. 4, 2015) (applying fraudulent joinder doctrine to joinder of diverse in-state defendant); Yellen v. Teledne Cont'l Motors, Inc., 832 F. Supp. 2d 490, 501–03 (E.D. Pa. 2011) (applying fraudulent joinder doctrine to joinder of diverse in-state defendant); Davenport v. Toyota Motor Sales, USA, Inc., No. 09-cv-532-JPG, 2009 WL 4923994, at *3 (S.D. Ill. Dec. 14, 2009) (holding fraudulent joinder doctrine does not apply to joinder of diverse in-state defendants); Sargent v. Cassens Corp., No. 06-cv-1042-MJR, 2007 WL 1673289, at *2 (S.D. Ill. June 7, 2007) (applying fraudulent joinder doctrine to joinder of diverse in-state defendant); Yount v. Shashek, 472 F. Supp. 2d 1055, 1059–60 (S.D. Ill. 2006) (holding fraudulent joinder doctrine does not apply to joinder of diverse in-state defendants). The original bill limited the application of the fraudulent joinder doctrine to joinder of non-diverse defendants, but it was later amended to also apply to joinder of diverse in-state defendants, as was suggested by Professor Arthur D. Hellman in his written testimony to the Senate Judiciary subcommittee at a hearing on the bill. *See Hearing on H.R. 3624*, *supra* note 1, at 68–69 (statement of Professor Hellman).

85. 718 F.3d 660 (7th Cir. 2013).

86. *See id.* at 668, 670–71.

Circuit noted that the Supreme Court, in *Wilson v. Republic Iron & Steel Co.*,[87] held that the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy."[88] In *Wilson*, an Alabama citizen sued his New Jersey employer for negligence and joined a co-employee who was a citizen of Alabama as an additional defendant.[89] Thus, the defendant-co-employee was not diverse from the plaintiff and was also an in-state defendant. In *Morris*, the Seventh Circuit concluded that although the Supreme Court referred to the co-employee as a resident defendant, the opinion should not be interpreted as extending the fraudulent joinder doctrine to joinder of diverse in-state defendants because the Court did not specifically consider whether the fraudulent joinder doctrine applies to joinder of diverse in-state defendants, given that the co-employee was a non-diverse defendant.[90]

The Seventh Circuit then examined how extending the fraudulent joinder doctrine to joinder of diverse in-state defendants would impact the relevant interests at stake—"the plaintiff's right to select the forum and the defendants," "the general interest in confining federal jurisdiction to its appropriate limits," "the defendant's statutory right of removal," and the "interest in guarding the removal right against abusive pleading practices."[91] The court noted that in a case involving an out-of-state plaintiff, an out-of-state defendant, and an in-state defendant, there is no need to protect the out-of-state defendant from local bias because any local bias would likely run against the out-of-state plaintiff.[92] Nevertheless, the court observed that extending the doctrine to joinder of diverse in-state defendants was consistent with the doctrine's "directive that federal courts vigilantly protect the removal right against abusive pleading practices."[93] As the Seventh Circuit reasonably concluded, the policy concerns motivating the application of the doctrine to joinder of non-diverse defendants are equally applicable to joinder of diverse in-state defendants. Just as a plaintiff should not be permitted to defeat a diverse defendant's right to remove by fraudulently joining a non-diverse defendant, a plaintiff should not be permitted to defeat a diverse defendant's right to remove by fraudulently joining a diverse in-state defendant.[94]

87. 257 U.S. 92 (1921).

88. *See Morris*, 718 F.3d at 667 (quoting *Wilson*, 257 U.S. at 97).

89. *See Wilson*, 257 U.S. at 93–94.

90. *See Morris*, 718 F.3d at 667.

91. *See id.* at 668 (citation omitted).

92. *See id.* at 668–69.

93. *See id.* at 670.

94. Although the bill would apply the fraudulent joinder doctrine equally to non-diverse and in-state defendants, the bill refers to non-diverse defendants as "defendants [who] are citizens of the same [s]tate as one or more plaintiffs" and to in-state defendants as "properly joined and served" defendants who are "citizens of the [s]tate in which the action was brought." *See* Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong. § 2. House Report 422 notes that the "prop-

IV. THE "PLAUSIBILITY" STANDARD

A. *Importation of the "Plausibility" Standard from* Twombly *and* Iqbal

The bill provides that fraudulent joinder has occurred if the district court finds, after reviewing the pleadings, amended pleadings, affidavits, and other extrinsic evidence submitted by the parties, that "it is not plausible to conclude that applicable [s]tate law would impose liability on that defendant."[95] Although the bill itself does not define the term "plausible," House Report 422 indicates that the term is taken from the Supreme Court's decisions in *Twombly* and *Iqbal*.[96] In both cases, the Court addressed the defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim and, in doing so, necessarily decided whether the plaintiffs had stated a claim—whether the plaintiffs had included "a short and plain statement of the claim showing that the pleader is entitled to relief" as required by Federal Rule of Civil Procedure 8(a)(2).[97]

B. *Review of* Twombly *and* Iqbal

In an attempt to understand the manner in which *Twombly* and *Iqbal*'s plausibility pleading standard will inform the application of the plausibility evidentiary standard contemplated by the bill, it is helpful to review *Twombly* and *Iqbal*. In *Twombly*, the plaintiffs, telephone and internet subscribers, brought a putative class action against various telecommunications providers, alleging an antitrust conspiracy.[98] The complaint alleged that the defendants engaged in parallel conduct to inhibit upstart companies from competing in their respective service areas and parallel conduct in refraining from pursuing opportunities in one another's markets.[99] The complaint contained a conclusory allegation that was based upon information and belief that the defendants had entered into a conspiratorial agreement.[100] Antitrust law, however, does not prohibit independent parallel anticompetitive behavior—it requires that the anticompetitive behavior stem from some agreement.[101] The Court held that the plaintiffs'

erly joined and served" language was derived from Section 1441(b)(2) and was included in the bill to "avoid[ ] any implication that the provision resolves [an] ongoing dispute in the lower [f]ederal courts over the propriety of removal before service of process on the resident defendants." *See* H.R. REP. NO. 114-422, at 10 (2016) (citing Breitweiser v. Chesapeake Energy Corp., No. 3:15-CV-2043-B, 2015 WL 6322625, at *2 (N.D. Tex. Oct. 20, 2015)). District courts are split over whether the forum defendant rule bars removal in cases where the plaintiff has named but not yet served the in-state defendant. *See* Breitweiser, 2015 WL 6322625, at *2–3 (discussing district court split over "snap removals").

95. *See* H.R. 3624 § 2.

96. *See* H.R. REP. NO. 114-422, at 12–13 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009)).

97. *See* FED. R. CIV. P. 8(a)(2).

98. *See Twombly*, 550 U.S. at 550–51.

99. *See id.*

100. *See id.* at 551.

101. *See id.* at 553.

allegations must plausibly suggest that there was an illegal agreement to engage in such conduct.[102] "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[103] The Court then held that the complaint failed to allege a plausible conspiracy because there was a "natural explanation" for the defendants' parallel behavior—each defendant was acting unilaterally to thwart competition and maintain its regional dominance.[104] The Court concluded that "the plaintiffs [ ] ha[d] not nudged their claims across the line from conceivable to plausible."[105] The Court's opinion was motivated, at least in part, by its concern over the growing cost of discovery in complex cases.[106] The Court expressed its skepticism about district courts' ability to reign in discovery costs and abuse successfully.[107]

Two years later, in *Iqbal*, the Supreme Court ruled that the plausibility standard applied to all federal complaints, not just complaints alleging antitrust violations, and then found the complaint at issue insufficient.[108] There, the plaintiff, a Pakistani Muslim who had been arrested in the United States after 9/11, sued various government officials, including the former attorney general, alleging that they had "subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin."[109] The Court held that the heightened pleading standard articulated in *Twombly applies to all cases—not just antitrust cases.*[110] Pursuant to the new, two-pronged test to be used when determining whether a pleading states a plausible claim, the district court must first disregard allegations that are bare legal conclusions, as opposed to factual allegations.[111] Next, the district court must determine whether the pleading contains sufficient factual allegations to state a plausible claim for relief,[112] which the Court acknowledged would be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[113] The Court stated that if the district court may not "infer more than the mere possibility of misconduct," the pleading fails to state a claim.[114] The

102. *See id.* at 556–57.

103. *Id.* at 556.

104. *See id.* at 566–68.

105. *See id.* at 570.

106. *See id.* at 558–59.

107. *See id.* ("[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery . . . .").

108. *See* Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009).

109. *See id.* at 666.

110. *See id.* at 678–79 (discussing Court's approach in *Twombly*).

111. *See id.*

112. *See id.* at 679.

113. *See id.* (citing Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)).

114. *See id.* (citing FED. R. CIV. P. 8(a)(2)).

Court observed that plausibility lay somewhere between "probability" and "sheer possibility," and further stated that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[115]

Applying the new test to the case at hand, the Court found that the plaintiff failed to state a claim. Although the Court found the plaintiff's allegations consistent with defendants' purposefully designating detainees as "high interest" due to race, religion or national origin, the Court found that discrimination was not plausible given the "obvious alternative explanation" for the disparate impact upon Arab Muslims—"a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks."[116] The Court again expressed its belief that this heightened pleading standard is preferable to the notice pleading regime, which relied more heavily upon the "careful case management" approach.[117] The Court held that the plausibility pleading standard was especially imperative "in suits where Government-official defendants are entitled to assert the defense of qualified immunity" because "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"[118]

C. *Criticisms of the Plausibility Pleading Standard*

The *Twombly* and *Iqbal* opinions have sparked much controversy and debate among judges, lawyers, legal academics, and those outside of the legal community.[119] The defense bar and the business community lauded the heightened pleading standard as necessary to reduce the increasing cost of litigation, screen out frivolous and abusive cases, and "protect [ ] business interests."[120] The plaintiffs' bar, civil rights groups, consumer advocates, and environmental groups feared that the heightened pleading standard would terminate meritorious claims before discovery, undermine enforcement of the substantive law in the civil rights arena and other areas

115. *See id.* at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

116. *See id.* at 682.

117. *See id.* at 685.

118. *See id.* (citing Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

119. *See* Brian T. Fitzpatrick, Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1621–22 (2012) (characterizing two decisions as "[p]erhaps the most controversial decisions thus far from the [Roberts Court]" and noting that "scholarly criticism of the two cases has been withering"); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 16–17 (2010) (noting that "sharp debate" and "sharp divide" precipitated by two cases has culminated in "fever pitch in some quarters" (footnote omitted)); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295–97 (2010) (observing that *Twombly* and *Iqbal* have "garnered considerable scholarly attention"); *see also supra* note 21 and accompanying text.

120. *See* Miller, *supra* note 119, at 16.

by foreclosing litigation, and increase the cost of litigation to plaintiffs who are already handicapped in many types of cases due to their asymmetrical access to critical information.[121]

The plausibility pleading standard was widely criticized for its novel nature.[122] It significantly altered prior pleading practice by adopting a standard without any precedent as guidance.[123] Existing law provided no guidance as to how convincing the factual allegations must be in order for the district court to find them plausible. Another widely made criticism was that the plausibility standard was unpredictable and likely to produce inconsistent results in similar cases given that lower courts were instructed to rely upon their judicial experience and common sense.[124] This criticism has been borne out in the years since *Iqbal*, as courts have reached different results in substantially similar cases.[125]

Commentators characterized the new test as "destabilizing," and they predicted that it would take a decade or more to even have some slight guidance about sufficient pleadings.[126] First, it was argued that because a large number of district court judges—about 675—would each apply their own experience and common sense to pleadings in a wide array of cases in order to determine plausibility, it was unlikely that any settled uniform application of the standard would emerge.[127] It was further argued that, even though the circuit courts would weigh in on appeals from such cases, "it [would] likely take years before any given circuit settles on a view of plausibility applicable to a wide variety of common complaints[,]" given the particularized nature of the inquiry in each case based upon the specific factual configuration.[128]

In addition, critics argued that the vague and ambiguous nature of the test would encourage defendants to file motions to dismiss in more

121. *See id.*

122. *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832–33 (2010) (characterizing test as "foggy" and noting that no "prior model ground[s] the new test for convincingness"); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 61 (2010) (observing that "'[p]lausibility' is not a self-defining term"); Miller, *supra* note 119, at 28–29 (observing that new test "raises novel questions").

123. *See* Clermont & Yeazell, *supra* note 122, at 832; Dodson, *supra* note 122, at 61; Miller, *supra* note 119, at 29.

124. *See* Clermont & Yeazell, *supra* note 122, at 841 (stating that "measuring plausibility seems . . . obviously unclear" given that "this measure lies entirely in the mind of the beholder"); Miller, *supra* note 119, at 30–31 (noting that "inconsistent rulings on virtually identical complaints may well be based on individual judges having quite different subjective views of what allegations are plausible" and observing that four dissenting justices in *Iqbal* found that complaint stated plausible claim).

125. *See supra* note 21 and accompanying text.

126. *See* Clermont & Yeazell, *supra* note 122, at 846.

127. *See id.* at 844.

128. *See id.* at 845 (citing Anthony Martinez, Note, *Plausibility Among the Circuits: An Empirical Survey of* Bell Atlantic Corp. v. Twombly, 61 ARK. L. REV. 763, 770 (2009)).

cases because the defendants would not likely be sanctioned for filing questionable motions given the unsettled nature of the standard and would likely benefit by gleaning helpful information from the plaintiffs' responses to the motions to dismiss and by placing additional cost and expense on plaintiffs, thereby stretching plaintiffs' resources.[129] Empirical data indicates that there was a substantial increase in the number of motions to dismiss for failure to state a claim after *Iqbal*—an increase in counseled cases from 1,672 cases in 2006 to 2,169 cases in 2010.[130] The same data indicates that nearly half of all motions to dismiss were denied in 2010.[131]

Many critics further attacked the plausibility pleading standard because they believed that it would decrease plaintiffs' access to justice in many types of cases where information is asymmetrical and discovery is needed in order to plead sufficient facts to state a plausible claim.[132] Although empirical data regarding the plausibility pleading standard's effect on the rate with which motions to dismiss are granted is debated, one study found a notable increase in the dismissal rate in employment discrimination and civil rights cases post-*Iqbal*.[133]

Finally, critics argued that the plausibility pleading standard is problematic because it is based upon an incorrect proposition that allegations are not true if they are not plausible.[134] In fact, as experience indicates, things that seem implausible are sometimes true.[135] A plaintiff's claim should not be barred simply because it appears implausible at the outset of litigation, particularly if such determination is based upon the plaintiff's failure to produce sufficient evidence supporting the claim before discovery.

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129. *See id.* at 840–41.

130. *See* Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2143–44 (2015).

131. *See id.* at 2143 tbl.1 (indicating 48% of motions to dismiss for failure to state claim were denied in 2010); *see also* William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35, 57 (2013) (indicating number of Rule 12(b)(6) motions filed after *Iqbal* has significantly increased and that slightly more than 48% of such motions were denied after *Iqbal*).

132. *See* Miller, *supra* note 119, at 40–41.

133. *See* Reinert, *supra* note 130; *but see* Hubbard, *supra* note 131 (finding that plausibility pleading standard had little effect on dismissal rates).

134. *See, e.g.*, Arthur H. Bryant, *'Iqbal' Brings Seven Years of Bad Luck for Plaintiffs*, NAT'L L.J. (May 23, 2016), http://www.nationallawjournal.com/id=1202758245088/Iqbal-Brings-Seven-Years-of-Bad-Luck-for-Plaintiffs?slreturn=20170125170633 [https://perma.cc/5JQK-ZASL].

135. For example, when *Iqbal* was decided eight years ago, few people would have thought it plausible that Donald Trump would be the Republican Party's nominee for President or that same-sex marriage would be legal nationwide. *See id.*

D. *Criticisms of the Bill's Plausibility Standard*

Advocates of the bill argue that the plausibility standard is "well understood by federal judges and will not create new litigation or confusion."[136] This view, however, is completely unrealistic. Advocates also claim that the bill is a "modest tweak to the standard for fraudulent joinder" that "does not expand diversity jurisdiction."[137] As is demonstrated below, the bill significantly alters the existing fraudulent joinder doctrine in a manner that will likely increase the number of removals, resulting not only in increased remand litigation attempting to delineate the contours of the new fraudulent joinder standards established by the bill, but also a greater number of successful removals based upon the purposefully more lenient standard that expands removal jurisdiction.

All of the criticisms that were leveled at the plausibility pleading standard established by *Twombly* and *Iqbal* may be validly raised with respect to the bill's plausibility standard for fraudulent joinder. It is a novel test with no precedent as guidance. Although House Report 422 suggests that *Twombly*, *Iqbal*, and their progeny will provide guidance on the application of the bill's plausibility standard, such guidance is likely to be of little utility.[138] First, as discussed above, courts have not consistently applied the plausibility pleading standard, in large part because it is very subjective. Second, and more importantly, *Twombly* and *Iqbal* established a pleading standard, whereas the bill directs district courts to consider extrinsic evidence when determining fraudulent joinder. Third, although the bill directs district courts to consider extrinsic evidence, the bill provides no guidance as to what evidentiary burden applies—i.e., the weight of evidence required from the plaintiff if the removing defendant challenges the factual basis for the plaintiff's claim against the spoiler.[139] Presumably, the applicable evidentiary burden is less than the burden applicable at the summary judgment stage, but determining exactly what burden applies is no easy task in light of the bill's total lack of guidance. Nor does the bill indicate what triggers a plaintiff's obligation to submit evidence to the district court—does the defendant merely have to challenge the factual basis for plaintiff's claims against the spoiler, or must the defendant submit some evidence rebutting plaintiff's factual allegations in order to require the plaintiff to respond with evidence in opposition?

In addition, the vague and ambiguous nature of the plausibility standard will encourage and invite defendants to remove cases where joinder is not fraudulent. Defendants have everything to gain, and very little to

136. *See Hearing on H.R. 3624*, *supra* note 1, at 46 (statement of Cary Silverman).

137. *See id.* at 35 (statement of Cary Silverman).

138. *See* H.R. REP. NO. 114-422, at 12–13 (2016).

139. *See Hearing on H.R. 3624*, *supra* note 1, at 27–28 (statement of Lonny Hoffman) (stating that it will take years—if ever—for fraudulent jurisdiction law in circuits to settle on consistent precedents on which lower courts and litigants can rely and noting bill fails to define requisite evidentiary burden of proof).

risk, by removing a case. Even if the case is eventually remanded to state court, the defendant will have benefitted by the delay in litigation and by forcing the plaintiff to expend limited resources on remand litigation.[140] When the case is remanded back to state court, it will likely be set for trial at a much later date than the original trial date.[141] A delay in the trial date likely delays settlement negotiations. Defendants generally do not have to pay pre-judgment interest on tort claims and thereby save interest costs during the delay.[142] Moreover, even though statutory law authorizes district courts to sanction defendants for wrongfully removing cases,[143] such sanctions are extremely rare.[144] One study found that the remand rate for cases erroneously removed based upon alleged fraudulent joinder was substantially higher than the remand rate for all cases erroneously removed based upon diversity jurisdiction.[145] The study concluded that the "high remand rate" in cases removed based upon allegations of fraudulent joinder indicates that there is "opportunity for defendants to abuse the [procedure]" to their advantage.[146]

Finally, the plausibility standard "raises serious federalism concerns."[147] Diversity jurisdiction authorizes federal courts to decide cases based upon state law without review by the state's highest court. In doing so, diversity jurisdiction thereby intrudes upon the state's ability to make the type of policy decisions that the Constitution reserves to the states.[148] This intrusion is particularly troublesome when federal courts decide am-

140. *See* Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 560–61 (2005); Christopher R. McFadden, *Removal, Remand, and Reimbursement Under 28 U.S.C. § 1447(C)*, 87 MARQ. L. REV. 123, 133 (2003); E. Farish Percy, *The* Tedford *Equitable Exception Permitting Removal of Diversity Cases After One Year: A Welcome Development or the Opening of Pandora's Box?*, 63 BAYLOR L. REV. 146, 180–81 (2011); Christopher Terranova, *Erroneous Removal as a Tool for Silent Tort Reform: An Empirical Analysis of Fee Awards and Fraudulent Joinder*, 44 WILLAMETTE L. REV. 799, 799–800 (2008).

141. *See* Eisenberg & Morrison, *supra* note 140, at 561–62; Percy, *supra* note 140, at 181.

142. *See* McFadden, *supra* note 140, at 133; Percy, *supra* note 140, at 181.

143. *See* 28 U.S.C. § 1447(c) (2012).

144. *See* McFadden, *supra* note 140, at 125; Percy, *supra* note 140, at 181 (noting that in eighty cases that were remanded after defendants erroneously removed based upon *Tedford* equitable exception, court sanctioned defendant for wrongful removal in only one case).

145. *See* Terranova, *supra* note 140, at 828–32 (noting one set of data yielded 50% remand rate for removals involving alleged fraudulent joinder compared to 27% remand rate for removals involving diversity jurisdiction and noting another set of data yielded 59% remand rate, making it 6.7 times more likely case removed based upon alleged fraudulent joinder in comparison to cases removed based upon diversity jurisdiction).

146. *See id.* at 799, 831, 837–38.

147. *See* Hellman, *supra* note 8, at 43.

148. *See supra* notes 85–94 and accompanying text.

biguous or novel issues of state law.[149] For these reasons, the Supreme Court has long held that the statutes conferring original and removal jurisdiction based upon diversity should be strictly construed.[150] Due to this precedent and underlying federalism concerns, most circuit courts hold that the defendant's burden in establishing fraudulent joinder is a heavy one and that any contested issues of fact or ambiguities in state law must be resolved in favor of the plaintiff.[151]

House Report 422 indicates that when the removing defendant challenges the legal basis for the plaintiff's claims against the spoiler, the district court should consider "whether there is a reasonable likelihood that the state courts would impose liability."[152] As was intended by the bill's drafters, this removal standard is much easier to demonstrate than any of the standards currently applied by circuit courts. In many cases where the plaintiff's claim against the spoiler is not frivolous, it may well be deemed implausible based upon the district court's prediction that the state court is likely to resolve a novel or ambiguous issue of state law against the plaintiff. This raises serious federalism concerns because the federal court would necessarily be intruding upon the state court's authority to decide state substantive law, and it would be doing so with respect to a claim over which it may not have jurisdiction. If the plaintiff's claim against the spoiler has a reasonable legal basis—if it is supported by existing law or a non-frivolous argument that the law should be changed—then the entire case is one that should be tried in state court.[153] In other words, the most

149. *See supra* notes 87–94 and accompanying text. When federal courts decide novel issues of state law, they sometimes err in predicting state law and therefore not only retard the development of state law, but also leave the losing party feeling deprived of justice. *See id.*

150. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941) (observing that federalism concerns require strict construction of removal statutes); Healy v. Ratta, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." (citing Matthews v. Rodgers, 284 U.S. 521, 525 (1932))).

151. *See, e.g.*, Brown v. Eli Lilly & Co., 654 F.3d 347, 356 (2d Cir. 2011); Travis v. Irby, 326 F.3d 644, 649 (5th Cir. 2003); Montano v. Allstate Indemnity, No. 99-2225 (10th Cir. Apr. 14, 2000); Alexander v. Elec. Data Sys. Corp., 13 F.3d 940, 948–49 (6th Cir. 1994).

152. *See* H.R. REP. NO. 114-422, at 12–13 (2016).

153. When evaluating claims of legal inadequacy, most courts have held that the inquiry is not as demanding as the inquiry when ruling upon a Rule 12(b)(6) motion because in cases involving uncertain issues of state law, the court has to determine only whether there is a reasonable basis for the claim, not whether the claim is recognized by existing law. *See* Percy, *supra* note 3, at 222 n.225 (collecting cases); *see also* Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 810–11 (8th Cir. 2003) (holding that in removal proceedings, district "court has no responsibility to definitively settle the ambiguous question of state law"); Hartley v. CSX Transp., Inc., 187 F.3d 422, 425 (4th Cir. 1999) (holding that "truly 'novel' issue . . . cannot be the basis for finding fraudulent joinder"); Crowe v. Coleman, 113 F.3d 1536, 1539 (11th Cir. 1997) (holding that "any ambiguity or doubt about the substantive state law favors remand"); Batoff v. State Farm Ins. Co., 977 F.2d 848, 853 (3d Cir. 1992)

appropriate standard for determining fraudulent joinder based upon legal inadequacy is one akin to the Rule 11 standard that focuses on whether the complaint's allegations "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[154]

House Report 422 indicates that when a removing defendant challenges the factual basis for the plaintiff's claim against the spoiler, the court should "determine whether there is a reasonable likelihood that the plaintiff can muster factual support for each element of the state-law claim."[155] First, the plausibility standard should not be equated with a "reasonable likelihood" standard, given that *Twombly* and *Iqbal* both hold that plausibility does not require probability.[156] As is further argued in the Section below, the bill's plausibility standard comes dangerously close to requiring district courts, which are directed to consider extrinsic evidence when determining whether the plaintiff's claim against the spoiler is plausible, to determine the merits of a state law claim over which they have no jurisdiction.

Additional federalism concerns arise because the bill not only intrudes upon the state's ability to establish state substantive law, but it also intrudes upon the state's ability to establish state procedural law. Many states have not adopted the *Iqbal* heightened pleading standard. The bill clearly contemplates that when a case is removed to federal court based upon fraudulent joinder, the plaintiff's complaint must satisfy the federal standard, even though it may be remanded back to state court for lack of jurisdiction.[157] Many courts applying the fraudulent joinder doctrine in the wake of *Iqbal* recognized the federalism issues raised by imposing federal pleadings standards upon plaintiffs when determining fraudulent joinder and accordingly determined that the state court pleading standard controls.[158]

(holding that "[a] claim which can be dismissed only after an intricate analysis of state law is not so wholly insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction").

154. *See* FED. R. CIV. P. 11(b)(2); *see also* Percy *supra* note at 3, at 218–25 (arguing that "reasonable basis for the claim test" is test that best determines fraudulent joinder and also accommodates federalism concerns); *but see* Underwood, *supra* note 2, at 1093–94 (arguing against Rule 11 proxy for fraudulent joinder and suggesting that abrogation of voluntary/involuntary rule would facilitate reform of fraudulent joinder).

155. *See* H.R. REP. NO. 114-422, at 13.

156. "Reasonable likelihood" could easily be interpreted to require a significant degree of probability, even if such degree is not more than fifty percent.

157. *See* H.R. REP. NO. 114-422, at 16 (noting bill contemplates plaintiffs amending pleadings after removal to satisfy higher federal standard).

158. *See, e.g.*, Manley v. Ford Motor Co., 17 F. Supp. 3d 1375, 1383 (N.D. Ga. 2014) ("[D]istrict courts should not disregard allegations in the complaint just because they do not comply with the federal pleading standards under *Twombly* and *Iqbal* . . . . because the relevant question for fraudulent-joinder purposes is whether the plaintiff has an arguable basis for holding the resident defendant liable under state, not federal, law."); Wong v. Michaels Stores, Inc., No.

Advocates of the bill argue that the plausibility standard does not raise federalism concerns because Congress has the authority to expand removal jurisdiction to the extent such jurisdiction is consistent with the Constitution.[159] One commentator acknowledged that this "den[ial] [of] state courts['] [ ] ability to decide and, ultimately, to shape state law" is "a routine feature of diversity jurisdiction," and therefore suggested that because diversity jurisdiction already raises federalism concerns, there is no harm in extending removal jurisdiction.[160] To the contrary, although Congress may constitutionally extend removal jurisdiction by redefining fraudulent joinder, the question at issue is whether it should. Any expansion of removal jurisdiction based upon diversity will result in federal courts deciding more cases based upon state law, thereby exacerbating the federal courts' intrusion into the policy decisions generally reserved for the states.[161]

Proponents of the plausibility standard also argue that this more lenient standard for fraudulent joinder is necessary to protect in-state residents and local businesses who are sometimes joined as spoilers from weak claims.[162] This rationale "played no role in the Supreme Court decisions that established the fraudulent joinder doctrine."[163] Not only does this justification for the expansion of removal jurisdiction raise federalism concerns as previously discussed, it also indicates a complete distrust of state courts. It is not sufficient to argue that further intrusion by federal

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1:11–cv–00162 AWI JLT, 2012 WL 718646, at *5 (E.D. Cal. Mar. 5, 2012) ("*Twombly* and *Iqbal* clarify the federal pleading standard set forth by Rule 8(a) but make no comment as to the propriety of pleading under California law."); DNJ Logistic Grp., Inc. v. DHL Express (USA), Inc., 727 F. Supp. 2d 160, 165 (E.D.N.Y. 2010) ("The more logical choice . . . is to apply state pleading standards, because 'the purpose of a fraudulent joinder analysis is to determine whether a *state* court might permit a plaintiff to proceed with his claims . . . .'" (quoting Kuperstein v. Hoffman-Laroche, Inc., 457 F. Supp. 2d 467, 471–72 (S.D.N.Y. 2006))); *see also Hearing on H.R. 3624*, *supra* note 1, at 32 (statement of Lonny Hoffman) (noting bill ignores longstanding federalism concerns by directing district courts to conduct merits inquiries and by imposing federal pleading standards on state courts).

159. *See, e.g.*, *Hearing on H.R. 3624*, *supra* note 1, at 42–43, 59 (statement of Cary Silverman); Hellman, *supra* note 8, at 42–43.

160. *See* Hellman, *supra* note 8, at 43 (internal quotation marks omitted).

161. *See supra* notes 140–43 and accompanying text; *see also* Hellman, *supra* note 8, at 43 (arguing federalism concerns should not prevent Congress from expanding removal jurisdiction because expanded removal jurisdiction will not "deny state courts the ability to decide and, ultimately, to shape state law" (internal quotation marks omitted)).

162. *See, e.g.*, *Hearing on H.R. 3624*, *supra* note 1, at 17 (statement of Elizabeth Milito) (stating reform of fraudulent joinder doctrine is necessary to protect small local businesses that may be joined as defendants from weak claims because of "inevitable risk that a plaintiff might prevail if the case goes before a sympathetic jury or an errant judge"); *see also* H.R. REP. NO. 114-422, at 4; Hellman, *supra* note 8, at 41–42 (arguing expansion of removal jurisdiction to protect in-state residents and local businesses from weak claims is "legitimate exercise of congressional power over federal-court jurisdiction").

163. *See* Hellman, *supra* note 8, at 41.

courts into determining cases based upon state law is warranted simply because some states may not have adopted rules or practices that are advantageous to defendants. States should be able to exercise their public policy making authority to determine whether they want to adopt the *Daubert* standard for admissibility of evidence, the *Twombly* and *Iqbal* pleading standard, proportionality limitations on discovery, or other rules or standards that have been established in federal courts.[164] That proponents of the bill are justifying expansion of diversity jurisdiction based upon dissatisfaction with state practice should cause Congress to pause and seriously consider the federalism concerns.

V. CONSIDERATION OF EXTRINSIC EVIDENCE

The bill's second-most notable provision not only authorizes, but also directs district courts to consider extrinsic evidence when determining fraudulent joinder. The bill provides that, when ruling upon a motion to remand in a case involving alleged fraudulent joinder the court "shall consider the pleadings, affidavits, and other evidence submitted by the parties."[165] House Report 422 indicates that the proceeding to determine fraudulent joinder will be similar to a summary judgment proceeding pursuant to Federal Rule of Civil Procedure 56(b).[166] Unlike Rule 56, however, the bill does not explicitly require that the evidence considered in the fraudulent joinder context be admissible at trial.[167] More importantly, however, the bill places no limitation upon district courts' consideration of extrinsic evidence or the degree to which discovery on the merits may proceed while the case is pending in district court.

Although many circuit courts have explicitly held that courts may pierce the pleadings and consider extrinsic evidence when determining fraudulent joinder, most have endorsed some form of limited piercing and have strongly cautioned against the type of broad piercing that would convert the jurisdictional inquiry into an inquiry on the merits of the state law claim.[168] A few courts, however, appear to endorse broad piercing of

164. *See* Hellman, *supra* note 8 at 44, n.96 (arguing reform of fraudulent joinder doctrine is warranted because state courts have not followed federal courts' lead in adopting rules and practices that decrease pressure on defendants to settle weak claims).

165. *See* Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong. § 2.

166. *See* H.R. REP. NO. 114-422, at 16.

167. *See* FED. R. CIV. P. 56(c)(2).

168. *See, e.g.*, *In re* Briscoe, 448 F.3d 201, 219–20 (3d Cir. 2006) (authorizing "limited look outside the pleadings" to determine whether claim against spoiler was time-barred because such piercing did not step "from the threshold jurisdictional issue into a decision on the merits" because "a statute of limitations defense is not a merits-based defense"); Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997) (noting "the jurisdictional inquiry 'must not subsume substantive determination'" and stressing that "the trial court must be certain of its jurisdiction before embarking upon a safari in search of a judgment on the merits" (quoting B., Inc. v. Miller Brewing Co., 663 F.2d 545, 548–50 (5th Cir. Unit A Dec. 1981))); Smoot v.

the pleadings, thereby condoning a procedure that closely resembles summary judgment.[169] For example, in *Dodd v. Fawcett Publ'ns, Inc.*,[170] the Tenth Circuit held that "upon specific allegations of fraudulent joinder the court may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available."[171]

In *Smallwood*,[172] the Fifth Circuit addressed this issue with the most detail of any circuit court. There, the court substantially limited the extent to which a district court may pierce the pleadings when determining fraudulent joinder. The court held that piercing is appropriate only in a narrow range of cases where the plaintiff has stated a claim against the spoiler but "misstated or omitted discrete facts that would determine the propriety of joinder."[173] The court suggested that discrete facts are facts that do not go directly toward the merits of the claim, such as whether a non-diverse doctor actually treated the plaintiff or whether a non-diverse pharmacist actually filled the plaintiff's prescription.[174] In such cases, the district court has discretion to conduct a summary inquiry.[175] The court further held:

> We emphasize that any piercing of the pleadings should not entail substantial hearings. Discovery by the parties should not be allowed except on a tight judicial tether, sharply tailored to the question at hand, and only after a showing of its necessity. Attempting to proceed beyond this summary process carries a heavy risk of moving the court beyond jurisdiction and into a resolution of the merits, as distinguished from an analysis of the court's diversity jurisdiction by a simple and quick exposure of the chances of the claim against the in-state defendant alleged to be improperly joined. Indeed, the inability to make the requisite decision in a summary manner itself points to an inability of the removing party to carry its burden.[176]

Chi., Rock Island & Pac. R.R. Co., 378 F.2d 879, 882 (10th Cir. 1967) ("[A] federal court [should not] pre-try, as a matter of course, doubtful issues of fact to determine removability; the issue must be capable of summary determination and be proven with complete certainty." (citing McLeod v. Cities Serv. Gas Co., 233 F.2d 242 (10th Cir. 1956))). For more discussion of the degree to which courts pierce the pleadings and consider extrinsic evidence when determining fraudulent joinder, see Percy *supra* note 3, at 224–29; Underwood, *supra* note 2, at 1056–081.

169. *See* Underwood, *supra* note 2, at 1056–81.

170. 329 F.2d 82 (10th Cir. 1964).

171. *See id.* at 85 (citations omitted).

172. 385 F.3d 568 (5th Cir. 2004).

173. *See* Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004).

174. *See id.* at 573 n.12.

175. *See id.*

176. *Id.* at 574.

Given that the Fifth Circuit, at the time, had experienced the highest number of removals based upon fraudulent joinder,[177] its limitations on piercing and discovery were presumably tailored to prevent the type of "runaway" fraudulent joinder proceedings that had been occurring.[178] The Fifth Circuit's greater experience and familiarity with fraudulent joinder suggests that its limited piercing approach should be given some degree of deference.[179]

This type of limited pleading is consistent with the Supreme Court's holding in *Wecker*.[180] There, the Court affirmed removal in a case where the district court considered extrinsic evidence—an affidavit establishing that the non-diverse defendant, a co-employee of the plaintiff, had no responsibility for the design of the furnace in question or for supervising the plaintiff.[181] In light of the plaintiff's failure to rebut such evidence, the Court held that removal was proper.[182] The issue involved, however, did not concern the merits of the plaintiff's independent negligence claims against his diverse employer. Thus, *Wecker* and *Smallwood* authorize limited piercing for the purpose of demonstrating a discrete issue—whether the spoiler owed any duty to the plaintiff.

Given the federalism concerns raised by removal diversity jurisdiction, the Fifth Circuit's limited piercing rule appropriately balances a diverse defendant's right to remove with the plaintiff's right to have a state court determine the merits of a state law claim against a non-diverse defendant. Even though federal courts have jurisdiction to determine jurisdiction, they generally must find jurisdiction before determining the merits of a case.[183] As the Supreme Court held in *Steel Co. v. Citizens for a Better Envi-*

177. The Fifth Circuit has decided many more fraudulent joinder cases than any other circuit court, as district courts within the Fifth Circuit have decided many more fraudulent cases than district courts in any other circuit. *See* Percy, *supra* note 3, at 240–41 app. (indicating that, from 1990–2004, Fifth Circuit decided 56 of total 116 appellate cases involving fraudulent joinder, while district courts within Fifth Circuit decided 918 of 1557 total cases involving fraudulent joinder during same time period); Terranova, *supra* note 140, at 829–32.

178. *See* Percy, *supra* note 3, at 228; *see also* James F. Archibald, III, Note, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377, 1392 (1992) (commenting upon "runaway" fraudulent joinder proceedings that amounted to plenary trials on merits). The Fifth Circuit's prior practice of authorizing broad piercing of the pleadings has been characterized as the "most radical [ ] when it comes to enabling district courts to consider evidence in the context of a fraudulent joinder inquiry." *See* Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 151 (2006).

179. Even though seven judges dissented from the majority's opinion in *Smallwood*, the dissenting opinions indicated disagreement with the Fifth Circuit's common defense rule, not its limited piercing approach.

180. 204 U.S. 176 (1907).

181. *See* Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 186 (1907).

182. *See id.* 184–85.

183. *See* United States v. United Mine Workers of Am., 330 U.S. 258, 291 (1947).

ronment,[184] a court that decides the meaning of "a state or federal law when it has no jurisdiction to do so is, by very definition . . . act[ing] ultra vires."[185]

The difficulty with respect to fraudulent joinder is that it requires the district court to assess the merits of the plaintiff's claims against the spoiler. By using a "reasonable basis for the claim" standard that focuses on whether there is a colorable basis for the claim, and by employing limited piercing, district courts can effectively make a cursory determination of whether there is a reasonable basis for the claim against the spoiler without finally resolving the merits of the claim. Given that the bill places no limitation whatsoever on consideration of extrinsic evidence or on the scope of discovery while the motion to remand is pending, there is every reason to be concerned that fraudulent joinder decisions would impermissibly cross the threshold from jurisdictional determinations to merits determinations.[186] Proponents of the bill appear to acknowledge that the plausibility standard in conjunction with the provision authorizing broad piercing of the pleadings will require the district court to make a merits-type analysis because the courts will be required to "evaluate whether the plaintiff has stated a 'plausible claim for relief' against the non-diverse defendant."[187]

As previously argued by this author, the "reasonable basis for the claim" test applied in a manner that allows limited consideration of extrinsic evidence is the combination of standard and procedure that best accommodates federalism concerns.[188] In cases where the removing defendant challenges the legal adequacy of the plaintiff's claim against the spoiler, the "reasonable basis for the claim" test simply examines whether the plaintiff has a non-frivolous legal argument in support of the claim. It does not require the district court to resolve any novel or ambiguous issues of state law. In cases where the removing defendant challenges the factual basis for the plaintiff's claim against the spoiler, the "reasonable basis for claim" test does not require the district court to weigh the merits of the claim against the spoiler. In combination with a limited piercing procedure, it authorizes a court to consider extrinsic evidence in a narrow range of cases where doing so is least likely to resemble a merits-type decision.

184. 523 U.S. 83 (1998).

185. *See id.* at 101–02.

186. *See Hearing on H.R. 3624*, *supra* note 1, at 31 (statement of Lonny Hoffman) (stating that "requiring extensive merits inquiry at the jurisdictional stage would be inconsistent with all other kinds of subject matter jurisdiction inquiries"). It has been argued that the district court would not be determining the merits of the plaintiff's claim because the district court's dismissal of the plaintiff's claim against the spoiler is without prejudice, thereby allowing the plaintiff to refile the claim against the spoiler in a separate action in state court. *See* Hellman, *supra* note 8, at 43.

187. *See Hearing on H.R. 3624*, *supra* note 1, at 46 (statement of Cary Silverman).

188. *See* Percy, *supra* note 3, at 216–29.

VI. CONSIDERATION OF DEFENSES AND COMMON DEFENSES

A. *Affirmative Defenses*

As an additional basis for fraudulent joinder, the bill includes a finding by the district court that "[s]tate or [f]ederal law clearly bars all claims in the complaint against [the] defendant."[189] This provision resolves a split among lower courts over whether affirmative defenses may be considered when determining fraudulent joinder and also abrogates the "common defense" rule established by the Fifth Circuit in *Smallwood*.[190]

Many circuit courts have explicitly authorized consideration of affirmative defenses when ruling on fraudulent joinder. For example, the Fourth Circuit affirmed the district court's denial of a plaintiff's motion to remand after finding that the plaintiff fraudulently joined the non-diverse defendant because the plaintiff's claim against such defendant was clearly preempted by the Communications Act.[191] Similarly, the Third Circuit held that the district court properly denied plaintiffs' motion to remand because "there could be no debate" that plaintiffs' claims against the non-diverse physicians were "time-barred as a matter of law."[192] In so ruling, however, the court cautioned that the "district court must rule out any possibility that a state court would entertain the cause" and further cautioned against stepping from the "threshold jurisdictional issue into a decision on the merits."[193] The court further held that a district court may take a "limited look outside the pleadings" to determine if the claim against the spoiler is clearly barred by a statute of limitations defense, noting that such defense is not a "merits-based defense to the plaintiff's case."[194] Although the Ninth Circuit held that a statute of limitations defense may be considered when determining fraudulent joinder if it is "perfectly clear" that the claim against the spoiler is time-barred, it held in a different case that an implied preemption defense was of a different character because it relates to the merits of a plaintiff's claim, unlike a statute of limitations defense.[195] The Eleventh Circuit has suggested that affirmative defenses may sometimes be the basis for finding fraudulent joinder but not when the application of the defense requires the district court to

189. *See* Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong. § 2.

190. *See* Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568 (5th Cir. 2004); H.R. REP. NO. 114-422, at 14–15 (2016) (stating bill abrogates *Smallwood* "common defense" rule).

191. *See* Johnson v. Am. Towers, LLC, 781 F.3d 693, 705–06 (4th Cir. 2015).

192. *See In re* Briscoe, 448 F.3d 201, 219 (3d Cir. 2006).

193. *See id.* (quoting Boyer v. Snap-on Tools Corp., 913 F.2d 108, 112 (3d Cir. 1990)).

194. *See id.* at 220.

195. *Compare* Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1319–20 (9th Cir. 1998), *with* Hunter v. Phillip Morris USA, 582 F.3d 1039, 1045 (9th Cir. 2009).

decide an unclear issue under state law.[196] The Fifth Circuit also allows consideration of affirmative defenses when considering fraudulent joinder.[197]

While a handful of district courts have refused to consider fraudulent joinder based upon affirmative defenses, most have done so, reasoning that the particular affirmative defense at issue delved into the merits of a plaintiff's claim against the spoiler.[198] Thus, to the extent there is some slight disagreement over whether affirmative defenses may be considered when determining fraudulent joinder, the bill reasonably resolves such disagreement. As has been recognized by numerous circuit courts, however, affirmative defenses should be the basis for finding fraudulent joinder only when it is perfectly clear that the claim against the spoiler is barred by the defense, and a district court should not engage a merits determination when considering affirmative defenses.

B. *Common Defenses*

The bill's provisions abrogate *Smallwood*'s common defense rule by making it clear that, in determining fraudulent joinder, the district court is to consider only the claim against the spoiler, not the claim against the diverse defendant.[199] In *Smallwood*, the plaintiff filed negligence claims against a diverse railroad and the non-diverse Mississippi Department of Transportation (MDOT) for injuries she sustained at a railroad crossing.[200] Both defendants answered, raising the affirmative defense that the

196. *See* Florence v. Crescent Res., LLC, 484 F.3d 1293, 1298–99 (11th Cir. 2009) (considering fraudulent joinder based upon statutory affirmative defense but holding court should not resolve unanswered questions of state law regarding affirmative defense).

197. *See, e.g.*, Boone v. Citigroup, Inc., 416 F.3d 382, 390–92 (5th Cir. 2005) (finding fraudulent joinder based upon statute of limitations); Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 574–76 (5th Cir. 2004) (considering whether joinder was fraudulent based upon federal preemption); Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100–02 (5th Cir. 1990) (finding fraudulent joinder based upon non-diverse defendants' immunity pursuant to state statutory law); Green v. Amerada Hess Corp., 707 F.2d 201, 205–08 (5th Cir. 1983) (considering res judicata and collateral estoppel when determining fraudulent joinder).

198. *See, e.g.*, City of Columbus, Ohio v. Sunstar Columbus, Inc., No. 2:15-cv-1864, 2015 WL 5775532, at *5 (S.D. Ohio Oct. 2, 2015); Vincent v. First Republic Bank Inc., No. C 10-01212 WHA, 2010 WL 1980223, at *4 (N.D. Cal. May 17, 2010).

199. *See* H.R. REP. NO. 114-422 at 14–15 (2016). The common defense rule has been extended to common defects. *See* Percy, *supra* note 3, at 234. A common defect is similar to a common defense in that it equally disposes of the claim against the diverse defendant and the spoiler. For example, assume a plaintiff sued a diverse drug manufacturer for defectively designing a pharmaceutical drug and a non-diverse physician for negligently prescribing the drug, which allegedly caused the plaintiff heart problems. If the diverse drug manufacturer removes, arguing there was fraudulent joinder because the heart problems were preexisting, that defect equally disposes of the plaintiff's claims against both defendants.

200. *See* Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 571–72 (5th Cir. 2004) (providing spirited 9-7 en banc decision on consideration of common defenses).

plaintiff's "claims . . . were preempted by the Federal Railroad Safety Act."[201] The railroad removed, arguing that MDOT was fraudulently joined because the plaintiff's claim against MDOT was preempted.[202] The district court agreed and dismissed MDOT and then granted summary judgment in favor of the railroad based upon the preemption defense.[203]

On appeal, the court held that a finding of fraudulent joinder cannot be based upon a common defense—a defense that equally disposes of the claim against the non-diverse defendant and the diverse defendant.[204] The court reasoned that the railroad's preemption defense went to the validity of the entire case rather than the propriety of the plaintiff's joinder of MDOT.[205] In so ruling, the court relied upon the Supreme Court's holding in *Chesapeake & Ohio Railway Co. v. Cockrell*.[206] In *Cockrell*, the plaintiff sued his intestate's diverse railroad employer and two non-diverse co-employees of the intestate, alleging that the co-employees negligently caused the intestate's death and that the railroad was vicariously liable.[207] The railroad removed, arguing that the plaintiff fraudulently joined the non-diverse co-employees because the co-employees were not negligent.[208] The Supreme Court held that the plaintiff's joinder of the non-diverse co-employees was not fraudulent because the railroad's contention "went to the merits of the action as an entirety," rather than joinder of the non-diverse defendants.[209]

> As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them.[210]

In later cases, the Supreme Court refused to find fraudulent joinder based upon the same reasoning.[211]

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201. *See id.* at 572.
202. *See id.*
203. *See id.*
204. *See id.* at 574–76.
205. *See id.* at 574.
206. 232 U.S. 146 (1914).
207. *See id.* at 150.
208. *See id.* at 150–51.
209. *See id.* at 152–53.
210. *Id.* at 153.
211. *See* S. Ry. Co. v. Lloyd, 239 U.S. 496, 500 (1916) (holding "a traverse of the facts alleged in the plaintiff's petition . . . in [a] way [that] undertak[es] to try the merits of a cause of action" cannot establish right to remove (citing *Cockrell*, 232 U.S. 146)); Chi., Rock Island, & Pac. Ry. Co. v. Whiteaker, 239 U.S. 421, 425

In *Boyer v. Snap-on Tools Corp.*,[212] the Third Circuit refused to find fraudulent joinder based upon the diverse defendant's argument that the plaintiff's claims against the spoilers were barred because the plaintiff had released them.[213] The court cited *Cockrell* and noted that the defense upon which the plaintiff's alleged fraudulent joinder was based would equally dispose of the claims against the spoiler and the diverse defendant.[214] Thus, the court determined that the defenses "went to the merits of the [entire case]," rather than the joinder of the spoilers.[215] The Ninth and Seventh Circuits, however, have found fraudulent joinder based upon common defenses. In *Ritchey v. Upjohn Drug Co.*,[216] the Ninth Circuit found fraudulent joinder in a case where the statute of limitations defense equally disposed of the claims against the diverse and non-diverse defendants.[217] Similarly, in *LeBlang Motors, Ltd. v. Subaru of America, Inc.*,[218] the Seventh Circuit found fraudulent joinder based upon the statute of limitations applicable to fraud claims, even though it equally disposed of the entire case.[219]

The current purpose of the fraudulent joinder doctrine is to thwart a plaintiff's "devices to prevent removal."[220] Generally, if the plaintiff's claim against the spoiler lacks a reasonable basis, then it is fair to presume the plaintiff joined the spoiler for the purpose of preventing removal of the plaintiff's claim against the diverse defendant. If, however, the same defense bars the plaintiff's claim against the spoiler and the diverse defendant, the basis for that inference is no longer apparent.[221] One cannot conclude that the plaintiff fraudulently joined the spoiler simply because the entire case lacks merit. While Congress may enact jurisdictional statutes within the confines of the Constitution, it should carefully consider all rationales for enlarging diversity jurisdiction. Abrogation of the com-

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(1915) (finding contention that non-diverse employee who was in no way negligent had been fraudulently joined concerned merits of entire case as opposed to joinder because claim against diverse railroad was based upon vicarious liability).

212. 913 F.2d 108 (3d Cir. 1990).

213. *See id.* at 112–13.

214. *See id.*

215. *See id.* at 113 (quoting Chesapeake & O.R. Co. v. Cockrell, 232 U.S. 146, 151 (1914)).

216. 139 F.3d 1313 (9th Cir. 1998).

217. *See id.* at 1315–17, 1320.

218. 148 F.3d 680 (7th Cir. 1998).

219. *See id.* at 692.

220. *See* Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 186 (1907).

221. The objective fraudulent joinder test focused on whether there is a reasonable basis for the claim is a proxy for determining whether the plaintiff subjectively joined the spoiler to prevent removal. *See* Percy, *supra* note 59, at 579. If the entire case lacks merits, there is no objective basis upon which to infer the plaintiff's fraudulent motive.

mon defense rule not only raises serious federalism concerns, but it also suggests total distrust of the state courts.[222]

As has been pointed out by one commentator, Congress is not bound by precedent establishing the common defense rule because it may enact jurisdictional statutes to the extent they are consistent with the Constitution.[223] As argued above, however, simply because Congress may redefine fraudulent joinder does not mean that it should. Abrogation of the common defense rule would mean that cases lacking complete diversity may be removed if the case is totally devoid of merit due to a common defense or common defect. Such an abrogation would significantly increase removal jurisdiction and thereby further add to the federalism concerns raised by the bill. In addition, as do other features of the bill, the abrogation of the common defense signals a distrust of state courts.

VII. THE "LACK OF GOOD FAITH INTENT TO PROSECUTE" STANDARD

Another basis for fraudulent joinder under the bill is a finding by the district court that "objective evidence clearly demonstrates that there is no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant."[224] Although some lower courts have interpreted Supreme Court precedent as authorizing removal based upon such a finding, the Supreme Court has never found fraudulent joinder based upon evidence of the plaintiff's subjective intent. In *Wilson v. Republic Iron & Steel Co.*,[225] the Court found that the plaintiff fraudulently joined his non-diverse co-employee as an additional defendant because the joinder was "without any reasonable basis in fact and without any purpose to prosecute the cause in good faith against the co-employ[ee]."[226] In so holding, the Court found no reasonable basis for the plaintiff's claims against his co-employee because the co-employee was not even present when the plaintiff was injured and was not responsible for the plaintiff's injuries.[227]

In *Chicago, Rock Island, & Pacific Railway Co. v. Schwyhart*,[228] the Court held that "[o]n the question of removal[,] we have not to consider more than whether there was a real intention to get a joint judgment, and whether there was colorable ground for it."[229] The Court rejected the removing defendant's argument that joinder was fraudulent because the spoiler would not be able to satisfy any judgment and further held that if

222. For a more thorough analysis of the common defense rule and the issues raised by its critics, see Percy, *supra* note 3, at 230–39.

223. *See* Hellman, *supra* note 8, at 38.

224. *See* Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong. § 2.

225. 257 U.S. 92 (1921).

226. *See id.* at 98.

227. *See id.* at 97–98.

228. 227 U.S. 184 (1913).

229. *See id.* at 194.

the plaintiff's claim against the spoiler is colorable, the plaintiff's motive for joining the spoiler is irrelevant and does not render joinder fraudulent.[230] "Again, the motive of the plaintiff, taken by itself, does not affect the right to remove. If there is a joint liability, he has an absolute right to enforce it, whatever the reason that makes him wish to assert the right."[231] Even though the Court used some language to suggest a subjective test in these two cases—"purpose to prosecute the cause in good faith" and "real intention to get a joint judgment,"[232] the Court clearly stated in *Schwyart* and numerous other cases that the plaintiff's subjective motive is immaterial as long as there is a reasonable basis for the plaintiff's claim against the spoiler.[233] Some lower courts have interpreted this precedent as establishing two alternative grounds for finding fraudulent joinder—no reasonable basis for the claim against the spoiler or no subjective intent on the part of the plaintiff to obtain a judgment against the spoiler.[234] Other courts, however, have interpreted this precedent as establishing a purely objective test focused on the basis for the claim.[235]

Even if existing common law does not support use of a subjective test, Congress has the authority to establish one by statute. Such a subjective test, however, is likely to be costly and ineffective. The provision authorizes a district court to consider objective evidence of the plaintiff's subjective intent. As noted in House Report 422, "the court should not inquire into the subjective intent of the plaintiff or his or her lawyer."[236] House

230. *See id.*

231. *See id.* at 193 (citing Chi., Burlington, & Quincy Ry. Co. v. Willard, 220 U.S. 413, 427 (1911); Ill. Cent. R.R. Co. v. Sheegog, 215 U.S. 308, 316 (1909)).

232. *See id.* at 194.

233. *See* Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 189–90 (1931) ("[T]he motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined."); Chi., Rock Island, & Pac. Ry. Co. v. Whiteaker, 239 U.S. 421, 424–25 (1915) (relying on *Schwyart*'s holding that plaintiff's motive does not render joinder fraudulent); Chi., Rock Island, & Pac. Ry. Co. v. Dowell, 229 U.S. 102, 114 (1913) ("If the plaintiff had a cause of action which was joint, and had elected to sue both tort feasors in one action, his motive in doing so is of no importance."); Chi., Burlington, & Quincy Ry. Co. v. Willard, 220 U.S. 413, 427 (1911) (holding plaintiff's preferences or motives were immaterial to fraudulent joinder determination); Ill. Cent. R.R. Co. v. Sheegog, 215 U.S. 308, 318 (1909) (holding that if plaintiffs can rightfully sue two tortfeasors who are subject to joint liability, "no motive could make his choice a fraud").

234. *See, e.g.*, Barlow v. Crane-Houdaille, Inc., No. WDQ-12-1780, 2015 WL 11070882, at *7–8 (D. Md. Oct. 8, 2015) (concluding Supreme Court precedent supports subjective "intent test").

235. *See, e.g.*, Selman v. Pfizer, Inc., No. 11-cv-1400-HU, 2011 WL 6655354, at *6–9 (D. Or. Dec. 16, 2011) (concluding Supreme Court precedent does not support subjective "intent test").

236. *See* H.R. Rep. No. 114-422, at 15. The original bill was amended so as to limit the court's consideration to objective evidence. The amendment may have been in response to concerns that defendants would seek discovery from the plaintiff and the plaintiff's lawyer regarding the plaintiff's subjective motive for joining the spoiler. *See, e.g.*, *Selman*, 2011 WL 6655354, at *11 (concluding subjective "intent test" "would invite potentially expensive and intrusive collateral discovery and

Report 422 indicates that objective evidence can consist of the plaintiff's "collective litigation actions."[237] Such objective evidence might include: (i) the plaintiff's failure to serve the jurisdictional spoiler, (ii) the plaintiff's failure to obtain a default judgment against the jurisdictional spoiler,[238] (iii) the plaintiff's failure to propound written discovery requests to the spoiler,[239] (iv) the plaintiff's failure to depose the spoiler, (v) the plaintiff's failure to designate an expert witness in support of the claim against the spoiler, and (vi) the plaintiff's failure to respond in opposition to a dispositive motion made by the spoiler. Given that most removals and succeeding motions to remand are filed at the outset of litigation due to statutory time periods, little objective evidence regarding the plaintiff's subjective intent will exist at the time district courts rule upon the large majority of motions to remand.[240] In addition, if Congress does establish a "lack of good faith intent to prosecute" standard, plaintiffs seeking to avoid removal will simply respond by taking sufficient action to avoid removal, such as seeking discovery from the spoiler. Thus, a "lack of good faith intent to prosecute" standard is likely to be unavailing.

The "lack of good faith intent to prosecute" standard is a corollary to the "bad faith in order to prevent a defendant from removing" standard established by the Federal Court Jurisdiction and Venue Clarification Act of 2011 (JVCA).[241] The JVCA established an exception to the bar on removal of cases based upon diversity jurisdiction more than one year after commencement in state court if "the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action."[242] In enacting the "bad faith to prevent removal" exception, Congress purposefully codified the equitable exception to the one-year bar that was recognized by the Fifth Circuit in *Tedford v. Warner-Lambert Co.*[243] An analysis of district courts' application of the *Tedford* equitable exception found that more than 83% of cases removed based upon the exception were remanded back to state court after the district court found no

discovery disputes, especially where the inquiry would seek to invade the thought-processes of the plaintiff's counsel"); *Hearing on H.R. 3624*, *supra* note 1, at 73 (statement of Arthur D. Hellman).

237. *See* H.R. REP. NO. 114-422, at 15.

238. *See, e.g.*, Joe v. Minn. Life Ins. Co., 257 F. Supp. 2d 845, 850 & n.9 (S.D. Miss. 2003).

239. *See, e.g.*, *In re* Avandia Mktg., Sales Practices and Prods. Liab. Litig., No. 7-md-1871, 2014 WL 2011597, at *3 (E.D. Pa. May 15, 2014) (finding plaintiffs had no intent to prosecute claim against forum defendant because they had not sought discovery from such defendant).

240. For a discussion of such time periods, see *supra* notes 24–30 and accompanying text.

241. *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified as amended in scattered sections of 28 U.S.C.).

242. *See* 28 U.S.C. § 1446(c)(1) (2012).

243. 327 F.3d 423 (5th Cir. 2003).

basis for removal jurisdiction.[244] Given that district courts are considering the "bad faith to prevent removal" standard more than one year after the litigation has been commenced, there is likely to be much more objective evidence regarding plaintiffs' intent at that point than would exist when district courts would be examining the "lack of good faith intent to prosecute" standard. Even with the greater availability of evidence after the one-year period, however, removing defendants were able to establish plaintiffs' bad faith only in fewer than seventeen percent of the cases removed.[245] Thus, there is good reason to predict that the "good faith intent to prosecute" standard will result in a similarly high remand rate given the likely lack of available objective evidence.

In addition, the open-ended nature of the "lack of good faith intent to prosecute" standard will invite and encourage defendants to remove based upon a very wide range of acts or omissions by the plaintiff, even if such acts or omissions have slight probative value as to the plaintiff's intent to prosecute. As argued above, defendants risk relatively little but stand to benefit a great deal from removal, even if the case is remanded to state court.[246] Thus, the "lack of good faith intent to prosecute" provision will generate more removal/remand litigation without securing any corresponding benefit of preventing fraudulent joinder given the minimal amount of evidence that is likely to exist when the large majority of motions to remand are ruled upon and the relative ease with which plaintiffs can create objective evidence of a "good faith intent to prosecute."

Another issue that might be problematic, or is at least unorthodox, is that the bill appears to foreclose consideration of direct evidence regarding the plaintiff's subjective intent.[247] While it is understandable that Congress might not want to intrude into the plaintiff's and the plaintiff's lawyer's subjective intent, it is reasonable to predict that, in at least a narrow range of cases, the plaintiff might desire to submit evidence of the plaintiff's subjective intent or motive—i.e., an explanation of the plaintiff's motive for joining the spoiler or a subjective explanation of the manner in which the claim against the spoiler is being prosecuted. The bill would prohibit a court from considering the plaintiff's own explanation even though such explanation might be highly probative of the plaintiff's subjective intent.

To the extent that legislative or judicial reform occurs, an objective test focused on the basis for the plaintiff's claim against the spoiler will adequately and efficiently prevent fraudulent joinder. The bill's "lack of

244. *See* Percy, *supra* note 140, at 179.

245. *See id.* at 180.

246. *See supra* notes 140–46 and accompanying text.

247. In other areas of the law where a party's subjective intent is at issue, relevant evidence includes not only objective evidence from which the party's subjective intent can be inferred, but also direct evidence of the party's subjective intent.

good faith intent to prosecute" provision would further complicate an already complex issue without achieving meaningful results.[248]

VIII. THE "ACTUAL FRAUD" IN THE PLEADINGS STANDARD

As a final basis for fraudulent joinder, the bill includes a finding of "actual fraud in the pleading of jurisdictional facts with respect to that defendant."[249] House Report 422 indicates that "misrepresenting or concealing the citizenship of a party" constitutes "actual fraud."[250] For example, a plaintiff might purposefully misrepresent that one of the defendants is a citizen of the same state as the plaintiff in an effort to defeat removal. As is demonstrated below, the "actual fraud in the pleadings" standard raises many questions and is essentially a solution in search of a problem.

A. *"Actual Fraud"*

With respect to fraudulent joinder based upon "actual fraud in the pleading of jurisdictional facts," the bill does not define what constitutes "actual fraud." Nor does it indicate whether the actual fraud must have been for the purpose of preventing removal. Although several circuit courts have held that a plaintiff's "outright fraud" or "actual fraud" in the pleading of jurisdictional facts constitutes fraudulent joinder,[251] none have clearly articulated what constitutes actual or outright fraud.[252] Even though actual fraud in the pleadings of jurisdictional facts has long been

248. The two law professors who provided testimony at the hearing on the bill share this view. *See Hearing on H.R. 3624*, *supra* note 1, at 72–75 (statement of Arthur D. Hellman) (stating "good faith intention" prong would be difficult to administer given that little evidence would exist during requisite time period); *id.* at 27–28 (statement of Lonny Hoffman) (stating bill gives no guidance as to how district courts should determine good faith and also that there is likely to be little objective evidence at time motions to remand are adjudicated).

249. *See* Fraudulent Joinder Prevention Act of 2016, H.R. 3624, 114th Cong. § 2.

250. *See* H.R. REP. NO. 114-422, at 12 (2016).

251. *See, e.g.*, Dutcher v. Matheson, 733 F.3d 980, 988 (10th Cir. 2013) ("actual fraud"); Hunter v. Philip Morris USA, 582 F.3d 1039, 1044 (9th Cir. 2009) ("actual fraud"); Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 763 n.9 (7th Cir. 2009) ("actual fraud"); Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004) ("actual fraud"); Mayes v. Rapoport, 198 F.3d 457, 464 (4th Cir. 1999) ("outright fraud"); Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998) ("outright fraud"); Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) ("outright fraud"); Coker v. Amoco Oil Co., 709 F.2d 1433, 1440 (11th Cir. 1983) ("outright fraud"), *superseded by statute as stated by* Stillwell v. Allstate Ins. Co., 663 F.3d 1329, 1333 (11th Cir. 2011).

252. *See* Sticker Synergy Corp. v. Gwyn, Civil Action No. 14-2521, 2015 WL 4097215, at *8 n.104 (E.D. La. July 6, 2015) (noting Fifth Circuit has not expressly defined "actual fraud" in pleadings); Randle v. SmithKline Beecham Corp., 338 F. Supp. 2d 704, 707 n.4 (S.D. Miss. 2014) ("[T]here is a dearth of case law discussing [actual fraud in the pleadings], and hence, little guidance on what must be present before a finding of actual fraud in pleading jurisdictional facts in a motion to remand."); Rodriguez v. Casa Chapa S.A., de C.V., 394 F. Supp. 2d 901, 906 (W.D. Tex. 2005) (discussing same).

recognized as a type of fraudulent joinder, district courts have rarely found such actual fraud.[253]

Not surprisingly, the few district courts that have considered the meaning of "actual fraud" in the pleadings have found that this type of fraudulent joinder requires something "more than a mistake or omission in the pleadings,"[254] such as a "deliberate 'false representation.'"[255] As noted by two district courts addressing allegations of actual fraud in the pleadings, Black's Law Dictionary defines "actual fraud" as "[a] concealment or false representation through a statement or conduct that injures another who relies on it in acting."[256] As further noted by one district court, *Black's Law Dictionary* defines "fraud" as "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."[257] These definitions, however, cannot be easily transposed to the term "actual fraud" in the bill. Both definitions include not only affirmative misrepresentations but also concealment.[258] Given that the bill refers to actual fraud in the pleadings, it might reasonably be interpreted to be limited to affirmative misrepresentation of jurisdictional facts in the pleadings because pleadings are by their nature affirmative representations of fact and do not involve the type of conduct that would typically be considered concealment. Moreover, given that procedural rules in many states generally do not require plaintiffs to plead facts in the complaint that are relevant to federal court subject matter jurisdiction, such as the parties' states of citizenship, the omission of such facts should

253. *See Sticker*, 2015 WL 4097215, at *8 ("The issue of actual fraud in the pleadings does not appear to be widely litigated . . . ."); *Randle*, F. Supp. 2d at 707 n.4 (indicating that court was not aware of any case involving fraudulent joinder based upon actual fraud in pleadings); Coffman v. Dole Fresh Fruit Co., 927 F. Supp. 2d 427, 434 (E.D. Tex. 2013) ("Few courts have addressed fraudulent joinder based on actual fraud in the pleading of jurisdictional facts."); *Rodriguez*, 394 F. Supp. 2d at 906 (noting large majority of fraudulent joinder cases do not involve actual fraud in pleadings); Cordill v. Purdue Pharma, L.P., No. 1:02CV00121, 2002 WL 31474466, at *2 n.5 (W.D. Va. Nov. 5, 2002) ("While not unheard of, outright fraud in the pleadings is uncommon . . . .").

254. *See* Coffman v. Dole Fresh Fruit Co., 927 F. Supp. 2d 427, 435 (E.D. Tex. 2013).

255. *See* Augustine v. Emp'rs Mut. Cas. Co., No. 2:08-cv-1102, 2010 WL 4930317, at *8 (W.D. La. Nov. 30, 2010); *see also Randle*, 338 F. Supp. 2d at 707 n.4 (recognizing some intentional misrepresentation is necessary).

256. *See Augustine*, 2010 WL 4930317, at *7 (quoting *Actual Fraud*, BLACK'S LAW DICTIONARY (8th ed. 2004)); *Rodriguez*, 394 F. Supp. 2d at 906 (quoting *Actual Fraud*, BLACK'S LAW DICTIONARY (8th ed. 2004))).

257. *See Rodriguez*, 394 F. Supp. 2d 901 at 906 (W.D. Tex. 2005) (quoting *Fraud*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

258. The *Restatement (Second) of Torts* distinguishes between fraudulent misrepresentation and fraudulent concealment. Section 525 governs liability for fraudulent misrepresentation and Section 550 governs liability for fraudulent concealment. Pursuant to Section 550, fraudulent concealment occurs when one person, "by concealment or other action intentionally prevents [another] from acquiring material information." *See* RESTATEMENT (SECOND) OF TORTS: LIABILITY FOR ECONOMIC HARM § 550 (2016).

not constitute fraud absent a duty to include such facts.[259] House Report 422, however, suggests that concealing the citizenship of a party may constitute "actual fraud" in the pleadings.[260]

Another question that might arise based upon the differing definitions of "fraud" and "actual fraud" is whether "actual fraud" requires that the misrepresentation to have been made for the purpose of preventing the diverse defendant from removing the case to federal court. In *Augustine v. Employers Mutual Casualty Co.*,[261] the district court found that the plaintiffs deliberately misrepresented that the sole member of a defendant LLC was a "Louisiana sole proprietor" so that the diverse defendant "would rely upon that statement to conclude it was unable to remove [the case] because true diversity did not exist."[262] Although the court found that the plaintiffs purposefully misrepresented the LLC member's citizenship for the purpose of preventing removal, it is not clear from the bill whether the district court must find that a plaintiff purposefully misrepresented jurisdictional facts or that the plaintiff purposefully misrepresented jurisdictional facts for the purpose of preventing removal. A different statutory provision governing removal in another context explicitly requires the district court to make a finding that a plaintiff acted in bad faith for the purpose of preventing removal.[263] The lack of such explicit language in this bill might be intentional or the result of oversight. The resolution of this issue is not likely to have a large impact given the rarity of actual fraud in the pleadings and the likelihood that a removal-prevention purpose may be reasonably inferred in the absence of any other explanation for an intentional misrepresentation of jurisdictional facts. In *Augustine*, the plaintiffs were essentially forced to concede that they knew the LLC member was not a Louisiana citizen at the time the complaint was filed because the plaintiffs had requested that service upon the LLC member be made pursuant to Louisiana's long-arm statute governing personal jurisdiction over nonresidents.[264] The *Augustine* court may well have in-

259. Many state courts are courts of general jurisdiction in which the plaintiff is not required to plead facts regarding the defendant's state of citizenship or a specific amount in controversy. *See, e.g.*, TEX. R. CIV. P. 47(b); *see also* Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of the Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 MO. L. REV. 681, 686–90 (1997).

260. *See* H.R. REP. NO. 114-422, at 11 (2016).

261. No. 2:08-cv-1102, 2010 WL 4930317 (W.D. La. Nov. 30, 2010).

262. *See id.* at *7. Given that the citizenship of an LLC is determined by the citizenship of its members, plaintiff's allegation regarding the LLC member's citizenship was a pleading of jurisdictional facts. *See id.* at *8.

263. 28 U.S.C. § 1446 (c)(1) provides that "[a] case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1) (2012).

264. *See Augustine*, 2010 WL 4930317, at *7.

ferred plaintiffs' motive due to the lack of any other explanation for the misrepresentation.

B. *"Jurisdictional Facts"*

Not only does the bill fail to define "actual fraud," it also fails to define "jurisdictional facts." *Black's Law Dictionary* defines a "jurisdictional fact" as "a fact that must exist for a court to properly exercise its jurisdiction over a case, party, or thing."[265] Many courts have referred to allegations regarding a party's citizenship as allegations of jurisdictional facts.[266] Although a plaintiff's allegation concerning the amount in controversy with respect to a claim against a diverse defendant is an allegation of jurisdictional fact in a case based upon diversity jurisdiction, an intentional misrepresentation of the amount in controversy with respect to the claim against a diverse defendant does not constitute fraudulent joinder of a non-diverse or in-state defendant. It is another type of strategic forum manipulation in which plaintiffs may engage, but that type of manipulation has already been addressed by the JVCA's amendment to 28 U.S.C. § 1446(c)(3), which authorizes removal of a case based upon diversity more than one year after commencement in state court if the district court finds that the plaintiff acted in bad faith by deliberately failing to disclose the amount in controversy to prevent removal.

A few courts have refused to limit "jurisdictional facts" to those relevant to a party's citizenship. In *Rodriguez v. Casa Chapa S.A. de C.V.*,[267] the court rejected a restrictive interpretation of "jurisdictional facts" as those limited to a party's citizenship or the amount in controversy and held that "jurisdictional facts can encompass other facts proximately leading to jurisdictional concerns."[268] There, the court found that the plaintiffs had committed actual fraud in the pleadings by suing a non-diverse defendant against whom they had no intention to seek a judgment.[269] A few courts considering "actual fraud in the pleadings" have considered or indicated a willingness to consider the evidentiary basis for the plaintiff's allegations of fact relevant to the merits of the substantive state law claim against the jurisdictional spoiler.[270] If legislation establishes an "actual fraud in the pleadings" standard, it should clarify what facts are jurisdictional.

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265. *See* Rodriguez v. Casa Chapa S.A. de C.V, 394 F. Supp. 2d 901, 907 (W.D. Tex. 2005) (quoting *Jurisdictional Fact*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

266. *See, e.g.*, Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 259 (5th Cir. 1995); Sticker Synergy Corp. v. Gwyn, No. 14-2521, 2015 WL 4097215, at *8 n.104 (E.D. La. July 6, 2015); Marabella v. Autonation U.S.A. Corp., 88 F. Supp. 2d 750, 752 (S.D. Tex. 2000).

267. 394 F. Supp. 2d 901 (W.D. Tex. 2005).

268. *See id.* at 907.

269. *See id.* at 907–08.

270. *See, e.g.*, Worldwide Battery Co., LLC v. Johnson Controls, Inc., No. 1:06-cv-00602-DFH-TAB, 2006 WL 3201915, at *3 (S.D. Ind. July 7, 2006) (finding sufficient evidence of plaintiff's allegations that defendants made defamatory state-

C. *Applicable Evidentiary Burden*

The bill also fails to indicate the applicable evidentiary burden. Presumably, the burden is on the defendant to prove that the plaintiff engaged in actual fraud in pleading jurisdictional facts.[271] A few district courts have held that the defendant must prove actual fraud in pleading by clear and convincing evidence.[272] Most courts require plaintiffs bringing tort claims for fraud to prove fraud by clear and convincing evidence.[273] The traditional justification for the greater burden in that context is that liability for fraud may damage the defendant's reputation and will likely subject the defendant to a claim for punitive damages.[274] A more recent explanation for the greater burden suggests that it is "better understood as a protection against encroachment into the law of contract by the law of tort."[275] Because most fraud claims arise from transactions between two parties, the law prefers that disputes arising from such transactions be resolved by contract law rather that tort law.[276] Neither of these justifications is applicable in the removal context. A greater burden for proving actual fraud in the pleadings might be justified as consistent with a defendant's heavy burden to prove removal jurisdiction.[277]

D. *A Solution in Search of a Problem*

Given the number of issues raised by the bill's "actual fraud in the pleadings" standard and the rarity with which actual fraud in the pleadings has been found to be the basis for removal based upon fraudulent joinder, this provision of the bill may be appropriately characterized as a solution in search of a problem. The provision does not target joinder that is fraudulent. Instead, it focuses on the accuracy of the allegations regarding jurisdictional facts.[278] Any questions regarding a party's true citizenship, however, can be resolved without relying on the fraudulent joinder

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ments about plaintiff to demonstrate that such allegations were not frivolous or fraudulent).

271. *See* Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) (holding that removing defendants bear burden of proving diversity jurisdiction based upon alleged fraudulent joinder).

272. *See, e.g.*, B.N. *ex rel.* Novick v. Bnei Levi, Inc., No. 12-CV-5057, 2013 WL 168698, at *2 (E.D.N.Y. Jan. 15, 2013); Tucker v. Kaleida Health, No. 09-CV-719S, 2011 WL 1260117, at *2 (W.D.N.Y. Mar. 31, 2011); Campisi v. Swissport Cargo Servs., LP., No. 09-CV-1507(FB)(JMA), 2010 WL 375878, at *2 (E.D.N.Y. Jan. 26, 2010).

273. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 9 cmt. e (AM. LAW INST., Tentative Draft No. 2 2014).

274. *See id.*

275. *See id.*

276. *See id.*

277. *See supra* notes 148–51 and accompanying text.

278. A plaintiff who commits fraud in the pleading of jurisdictional facts has not acted inappropriately in joining the claims against the jurisdictional spoiler—only in pleading facts relevant to a properly joined party's citizenship.

doctrine. If the plaintiff innocently, negligently, or intentionally misrepresents jurisdictional facts regarding a party's citizenship, the defendants may simply remove and assert that complete diversity does in fact exist. If the plaintiff moves to remand, the defendants then bear the burden of proving that complete diversity exists. The defendants are not required to prove that the plaintiff intentionally misrepresented a party's citizenship. Thus, not only does the bill's "actual fraud in the pleadings" provision raise several questions regarding the scope of its application, but it is also totally unnecessary in order to protect diverse defendants' right to remove in cases where the plaintiff has made false allegations about a party's citizenship in an effort to defeat removal jurisdiction. To the extent legislation is enacted to reform the fraudulent joinder doctrine, it should omit "actual fraud in the pleadings" as a basis for finding fraudulent joinder.

IX. CONCLUSION

The common law fraudulent joinder doctrine is "inherently complex" and nuanced.[279] The doctrine, however, will continue to be relevant and necessary as long as Congress continues to grant federal court jurisdiction that requires complete diversity. In 1990, the congressionally appointed Federal Courts Study Committee recommended that Congress do away with diversity jurisdiction with a few exceptions: complex multi-state litigation, interpleader, and suits involving aliens.[280] The report concluded that "no other class of cases has a weaker claim on federal judicial resources" or is as responsible for growth of the federal caseload.[281] The report acknowledged the possibility of local bias in some district courts but found that such possibility was not compelling enough to justify continued diversity jurisdiction.[282] Others have similarly questioned the continued need for diversity jurisdiction.[283] Although Congress was unwilling to limit diversity jurisdiction in the suggested manner, it did increase the

279. *See* Richardson, *supra* note 178, at 122.

280. *See* FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38 (1990).

281. *See id.* at 32.

282. *See id.* at 40. The report also concluded that there was little need for a federal forum in most diversity cases, noting that federal courts enjoy no advantage in interpreting state law given that "[f]ederal rulings on state law issues have little precedential effect." *See id.* at 33.

283. *See, e.g.*, Nima Mohebbi, Craig Reiser & Samuel Greenberg, *A Dynamic Formula for the Amount in Controversy*, 7 FED. CTS. L. REV. 95, 100–01 (2013) (citing numerous scholars who view general diversity jurisdiction as unjustified); Percy, *supra* note 3, at 200–01 (reviewing arguments made by academics and others in favor of abolishing diversity jurisdiction); James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 196–98 (2006) (noting that numerous judges, academics, and special interest groups propose abolishing diversity jurisdiction).

amount-in-controversy requirement from $50,000 to $75,000 in 1996, thereby decreasing diversity jurisdiction.[284]

Since the 1990 report, however, Congress has enacted several statutes that have expanded diversity jurisdiction and jurisdiction over state law claims,[285] including (i) the Judicial Improvements Act of 1990, establishing supplemental jurisdiction over state law claims that are part of the same case or controversy as claims over which federal courts have original jurisdiction,[286] (ii) the Multiparty, Multiforum Trial Jurisdiction Act of 2002, extending federal jurisdiction to mass tort cases involving minimal diversity if they arise out of a single accident that caused the death of seventy-five people or more,[287] (iii) the Class Action Fairness Act of 2005, extending federal jurisdiction to class actions involving minimal diversity if the amount in controversy exceeds $5 million,[288] and (iv) the Jurisdiction and Venue Clarification Act of 2011, extending removal jurisdiction based upon diversity by recognizing a "bad faith" exception to the bar on removal of diversity cases more than one year after commencement in state court.[289] The advantages and disadvantages of limiting versus extending diversity jurisdiction are beyond the scope of this Article.[290] It may well be

284. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (codified in several sections of judicial code).

285. *See., e.g.*, Underwood, *supra* note 283, at 202 (observing that in enacting discussed legislation extending diversity jurisdiction, "Congress . . . chose[ ] a path that will lead to a resurgence in the importance of diversity jurisdiction, and which may be a harbinger for additional aggressive exercises of [diversity jurisdiction] . . . in the future").

286. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(a), 104 Stat. 5089, 5113 (codified as amended at 28 U.S.C. § 1367 (2012)). Although courts had exercised "pendant claim jurisdiction" prior to the passage of the Act, the Supreme Court interpreted the Act to no longer require each plaintiff to establish the minimum amount in controversy, thereby expanding jurisdiction over claims based upon state law. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558–59 (2005).

287. *See* Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1825–28 (codified in Chapter 85 of 28 U.S.C.).

288. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat 4 (codified in scattered sections of 28 U.S.C.).

289. *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified as amended in scattered sections of 28 U.S.C.); *see also supra* notes 241–43 and accompanying text.

290. It has been suggested that Congress enacted some of these recent statutes extending diversity jurisdiction without considering the traditional justifications for diversity jurisdiction and in the absence of any overall coherent view of the modern day justification for diversity jurisdiction. *See, e.g.*, Underwood, *supra* note 283, at 208–09 (noting that Multiparty, Multiforum Trial Jurisdiction Act "bestow[s] diversity jurisdiction for reasons unrelated to the prevention of local bias" and concluding that "dramatic step by Congress . . . has 'broad implications' for issues of federalism" (citing C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 627 (2004))). It has also been suggested that Congress enacted this recent legislation expending diversity jurisdiction in response to the business lobby that has spent millions of dollars to funnel class actions and other complex litigation into federal courts. *See, e.g.*, David Rogers & Monica Langley, *Bush Set to*

time for Congress to completely reconsider the continued need for diversity jurisdiction and the extent to which continued diversity jurisdiction should require complete diversity. In the meantime, however, any legislation that expands removal jurisdiction based upon diversity should be the product of considered study and examination.

While the bill's impact might be viewed as modest when compared to some recent legislation extending diversity jurisdiction, and in light of the fact that Congress could totally do away with the complete diversity requirement, such perspective fails to consider whether the bill appropriately balances numerous factors, including (i) federalism concerns that are raised every time Congress broadens original diversity jurisdiction or removal jurisdiction based upon diversity, (ii) diverse defendants' interest in having state law claims decided in federal court, (iii) whether there is any helpful existing precedent that will guide courts in the application of new fraudulent joinder standards, (iv) the likely success of any new fraudulent joinder standards in achieving uniformity, (v) the additional costs that will be generated by the increased fraudulent joinder litigation that the bill is certain to produce, and (vi) whether the new fraudulent joinder standards will give rise to greater abuse by removing defendants.

The Fraudulent Joinder Prevention Act does not move the law in the right direction. The bill's plausibility standard for fraudulent joinder will generate substantial litigation and fail to produce a uniform standard, while also raising federalism concerns. The bill's provision authorizing unlimited piercing of the pleadings invites runaway fraudulent joinder proceedings that mirror summary judgment proceedings. The bill's abrogation of the common defense rule not only raises federalism concerns but also implies distrust of state courts. The bill's "good faith intent to prosecute" standard is unlikely to be effective due to the unavailability of objective evidence at the relevant time and the relative ease with which plaintiffs may objectively demonstrate a "good faith intent to prosecute." The bill's "actual fraud in the pleadings" standard is problematic and unnecessary.

Rather than pass a bill that appears to have been introduced at the behest of various special interest groups without careful vetting by judges, lawyers, academics, and others, Congress should undertake a thorough examination of the fraudulent joinder doctrine. In doing so, it should consider the appropriate standard for determining fraudulent joinder, the degree to which district courts may pierce the pleadings, whether common defenses and common defects can be considered when determining fraudulent joinder, whether the voluntary/involuntary rule should be ab-

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Sign Landmark Bill on Class Actions, WALL ST. J., (Feb. 18, 2005, 12:01 AM), https://www.wsj.com/articles/SB110866599480657890 [https://perma.cc/4E55-2EQY].

rogated,[291] and whether any such reform should also delineate the contours of the emerging fraudulent misjoinder doctrine.[292]

291. *See supra* notes 27 and 154 and accompanying text.
292. *See supra* note 61.